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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
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1958

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R.S.C., *Ord.* 17, *r.* 4 - **Wynn-Parry J. 615**

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R.S.C., *Ord.* 54A, *rr.* 1, 1A **Danckwerts J. 422**

AUSTRALIA

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (*S.R. & O.*, 1947, *No.* 806), *Sch.*, *art. II* (1) (i) (3); *art. III* (2) (3) - - **C.A. 427**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

In re WILLS' WILL TRUSTS.
WILLS *v.* WILLS.

[1957 W. 2402.]

1958
Apr. 24, 25,
28, 29;
May 23.

Upjohn J.

Trust and Trustee — Power of advancement — Validity — Remoteness — Power to apply vested or contingent share of any person interested under will for his or her benefit or benefit of child or children— Meaning of " vested "—Whether power void for remoteness.

Trust and Trustee—Power of advancement—Exercise of power—Settlement—Will—Express power contained in settlement to " raise " part of fund for benefit of children and grandchildren of settlor— Settlement on contingent trusts for infant grandsons—Whether valid exercise of power—Meaning of " raise."

By clause 14 of his will a testator gave his residuary estate on trust as to two fifth parts for his wife for life and as to three fifth parts for his children who, being male, should attain the age of 25, or, being female, should attain that age or marry under it; and after the death of his wife as to the two fifth parts on the same trusts as those concerning the three fifth parts. By clause 15 the share of each daughter was settled on her for life with remainder to her issue.

Clause 18 authorized the trustees " after the determination or " failure of every prior life or other interest . . . or previously " thereto with the consent in writing of every person in existence for " the time being entitled to any such prior interest . . . whether " vested or contingent to raise any part . . . of the then expectant " contingent presumptive or vested share portion or legacy of any " person under any of the trusts . . . [of the will] . . . and to pay " or apply the same for his or her advancement or benefit or for the "benefit of any child [or] children . . . of such person" as the trustees should think fit.

The testator died on October 11, 1927, leaving surviving him five children, the eldest being a son, M., who was born on October 4, 1915. In 1939 M. married and on May 31, 1940, twin sons were born when M. was on active military service and four months short of his 25th birthday. On June 15, 1940, the trustees in purported exercise of the power contained in clause 18 of the will executed a deed reciting that they had appropriated certain investments to the share of residue to which M. was contingently entitled, and declaring that those investments should be held on certain trusts for the twin sons of M. on their attaining the age of 21, and if they failed to attain that age, then on the trusts applicable if the deed had never been executed.

Another son was born to M. on June 26, 1941. M. duly attained the age of 25 but died on March 16, 1943, on active service.

On a summons to determine whether the advancement clause in the will was void for remoteness, and, if not, whether the deed of 1940 was a valid exercise of the power conferred by it:—

Held, (1) that "vested" in clause 18 of the will meant vested in interest and the power of advancement came to an end in respect of sons' shares when the share vested absolutely, that is, as and when each son attained the age of 25; accordingly, in relation to M.'s share, the power contained in clause 18 was valid and did not offend the rule against remoteness.

Assuming that in the case of daughters' shares the power was void, that did not invalidate the power in relation to sons' shares.

(2) That, although no settlement made by way of advancement upon an object of the power by trustees must conflict with the principle delegatus non potest delegare, trustees exercising a power of advancement might otherwise validly make settlements upon such objects if the particular circumstances of the case warranted that course as being for their benefit.

Roper-Curzon v. *Roper-Curzon* (1871) L.R. 11 Eq. 452; *In re Halsted's Will Trusts* [1937] 2 All E.R. 570; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332 and *In re Meux* [1958] Ch. 154; [1957] 2 All E.R. 630 applied.

In re May's Settlement [1926] 1 Ch. 136 and *In re Mewburn's Settlement* [1934] Ch. 112 distinguished.

(3) That in the present case an immediate application effected by a simple settlement creating contingent interests was for the benefit of the twins in case M. should die under the age of 25, of which there was a real risk.

(4) That the investments were "raised" by being taken out of the trusts of residue and held on new trusts for the benefit of the twins; and that, accordingly, the deed of 1940 was a valid exercise of the power contained in clause 18 of the will.

ADJOURNED SUMMONS.

By this summons, the plaintiffs, the trustees of the will of Frederick Noel Hamilton Wills (hereinafter referred to as "the

" testator "), asked the court to determine whether a settlement made by deed poll dated June 15, 1940, and made by the trustees in exercise of the power vested in them by clause 18 of the will of the testator, was a valid settlement or was an invalid settlement because the said power was void for perpetuity.

The facts are taken from the judgment of Upjohn J.

The testator made his will on June 2, 1918. After appointing executors and trustees, he bequeathed a number of legacies and disposed of his residuary estate by clause 14, which provided: " Subject as aforesaid I direct that my trustees shall hold my " residuary estate upon trust, as to two equal fifth parts thereof, " to pay the income thereof to my said wife during her life " without power of anticipation during coverture in addition to " the other benefits hereinbefore given to her and from and after " the death of my said wife shall hold the capital and future " income of the said two fifth parts of my residuary estate upon " the trusts hereinafter declared of and concerning the remaining " three equal fifth parts thereof And as to the remaining three " equal fifth parts of my residuary estate I direct that my " trustees shall hold the same upon trust for all or any my " children or child who being male shall attain the age of twenty-" five years or being female shall attain that age or marry under " it and if more than one in equal shares except that each son " shall take three times as much as each daughter." By clause 15 the testator settled the daughters' shares on trust for the daughter for life with remainder to her issue as she should appoint and with trusts in default of appointment. By clause 18 the testator gave a power of advancement as follows: " I authorize my trustees after the determination or failure of " every prior life or other interest or interests (if any) or previously " thereto with the consent in writing of every person in existence " for the time being entitled to any such prior interest or interests " whether vested or contingent to raise any part or parts not " exceeding in the whole one moiety of the then expectant " contingent presumptive or vested share portion or legacy of " any person under any of the trusts or dispositions of this my " will or any codicil hereto and to pay or apply the same for his " or her advancement or benefit or for the benefit of any child " children or wife of such person as my trustees shall think fit " And I declare that the power of advancement aforesaid may " be exercised in favour of any daughter of mine in respect of her " share notwithstanding that she is entitled to a life interest only " therein."

1958

WILLS' WILL TRUSTS, *In re.*

The testator died on October 11, 1927, and his will was duly proved by the executors therein named. At the date of his death the testator left him surviving five children, all infants, of whom the eldest was Michael Desmond Hamilton Wills (hereinafter referred to as "Captain Wills"). He was born on October 4, 1915. He married the fourth defendant, Mary Margaret Gibbs, in 1939 and of that marriage there was issue three children, namely, two twins, the first and second defendants, who were born on May 31, 1940, and the third defendant, who was born on June 26, 1941. Captain Wills duly attained the age of 25 but died on war service on March 16, 1943. On June 15, 1940, when the twins were some fortnight old, the then trustees (who were not the original executors and trustees appointed by the testator's will) executed a deed declaring certain trusts in purported exercise of the power conferred by clause 18 of the will. The deed contained a number of recitals, those material to this report being the last two, (E) and (F), which recited that certain investments including the investments mentioned in the schedule thereto had been appropriated by the trustees to the share of the residuary estate to which Captain Wills was contingently entitled and that for the benefit of the infant sons of Captain Wills the trustees had determined to execute those presents. By the operative part of the deed in purported exercise of the power contained in clause 18 of the will the trustees irrevocably declared and directed that the investments mentioned in the schedule thereto should thenceforth be held upon the trusts following: "(i) If both the elder twin and the younger twin attain the age "of twenty-one years as to three equal fourth parts thereof in "trust for the elder twin if and when he attains twenty-one and "as to the remaining one equal fourth part in trust for the "younger twin if and when he attains that age. (ii) If the elder "twin attains but the younger does not attain the age of twenty-"one years as to the whole in trust for the elder twin if and "when he attains that age. (iii) If the elder twin dies under "the age of twenty-one years as to the whole in trust for the "younger twin if and when he attains that age. Provided "always that if neither the elder nor the younger twin attains the "age of twenty-one years the investments aforesaid shall be held "upon the trusts which would have been applicable thereto if "this deed had never been executed and provided also that until "some person or persons shall become absolutely and indefeasibly "entitled to the investments aforesaid the provisions now applic-"able thereto under the will of the testator and the said deed of "appointment as to investment and variation of the investment "thereof shall continue to be operative."

By his will Captain Wills gave a third of his residue to his widow absolutely and two-thirds to his children who should attain 21.

Lionel Edwards Q.C. and *E. B. Stamp* for the third defendant. The power of advancement is void for remoteness on two grounds. First, it is clear from the opening words of clause 18 that the power can apply to a vested share where there has been no prior life interest. Therefore, "vested" must mean not only vested in interest but vested in possession. On the true construction of the power it applies to the share of a son after it has vested in possession, so that on attaining 25 a son would not have any absolute right to call on the trustees to transfer to him his vested share because the trustees might desire to exercise the power in favour of the son's wife or children. The trustees' discretion to apply for the benefit of a wife and children may be exercised outside the perpetuity period. [Reference was made to *In re De Sommery*[1] and *In re Coleman*.[2]]

Secondly, at the date of the testator's death there was no such thing as a child's vested share; there were simply contingent interests. For the purpose of the rule against perpetuities one must look at possibilities, and one possibility would be that the whole share of residue would vest in a daughter. In that case the power of advancement in relation to a daughter's share is void for remoteness. It is impossible to split the power because at the date of the testator's death there was only one entire fund in which three children were contingently interested: *In re Vaux*.[3] Even if it were possible on its construction to split the power, which it is not, it would be of no avail. The only way to divide it would be to read it as a power for the benefit of a beneficiary on the one hand and for the benefit of the wife or children of a beneficiary on the other, which is clearly bad.

Even if the power is not void for remoteness, the deed of 1940 is not a good exercise of it. The deed poll purports to declare trusts of specified investments in which each twin is to take a contingent interest. The question is whether that declaration of new trusts is a valid exercise of the power to raise part of their father's contingent share and pay and apply the same for the

[1] [1912] 2 Ch. 622.

[2] [1936] Ch. 528; [1936] 2 All E.R. 225.

[3] [1939] Ch. 465; 55 T.L.R. 92, 230; [1938] 4 All E.R. 297, 703 (C.A.).

benefit of the children. It is submitted that in executing that deed the trustees raised nothing, paid nothing and applied nothing for anyone. In *In re Vestey's Settlement* [4] Lord Evershed M.R. left open the question whether sub-trusts can be created under such a power as this. On the face of the evidence nothing was raised or paid here; the investments remained the same. And there was no application of the investments for the twins' benefit; to come within the terms of the power the application must be for their benefit, and this declaration of trusts in the deed may not be for their benefit. An immediate benefit may accrue to one of the children because some income may be applied under section 31 of the Trustee Act, 1925, but that is beside the point and has no bearing on the central question, namely, whether this is an application of the investments themselves for the benefit of the infants within the meaning of clause 18. If, on the true construction of the words, "raise and apply for the benefit" of a son or daughter could extend to the declaring of trusts giving the son or daughter contingent interests, then *In re May's Settlement* [5] and *In re Mewburn's Settlement* [6] must have been differently decided, because that would have been giving the trustees power to alter the trusts. Therefore the words cannot bear that meaning. This case shows a mere power of advancement and does not show any power to alter trusts. The clause in *In re Vestey's Settlement* [7] offers some guide. The decision is against us, but it is distinguishable and shows that if the Court of Appeal had been considering contingent interests there, their decision would have been different.

E. B. Stamp following. In *In re Ropner's Settlement Trusts* [8] the trustees could not have made an appointment in favour of grandchildren. The real question raised here was not discussed there. Alternatively, that case was decided per incuriam. *In re Meux* [9] is distinguishable. *In re Vestey's Settlement* [10] is not a case of a power of advancement; it is not even a case of a power. The court was dealing with a binding trust to pay and apply income to or for the benefit of a class which included infants. There is nothing in that case which throws any light on the construction of the power in this case. *In re May's Settlement* [11] and *In re Mewburn's Settlement*[12] are authority for the proposition that a power to "pay or apply" capital for the benefit of a beneficiary does not authorize the creation of trusts for the benefit of the beneficiary; for if it did, the appointments in those cases would clearly have been held invalid.

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[4] [1951] Ch. 209; [1950] 2 All E.R. 891.

[5] [1926] 1 Ch. 136.

[6] [1934] Ch. 112.

[7] [1951] Ch. 209.

[8] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.

[9] [1958] Ch. 154; [1957] 2 All E.R. 630.

[10] [1951] Ch. 209.

[11] [1926] 1 Ch. 136.

C. Montgomery White Q.C. and *D. H. McMullen* for the first and second defendants. Two questions arise: (1) Is the power conferred by clause 18 of the will bad (wholly or in part) for perpetuity? and (2) If not, was the deed of June 15, 1940, validly made in exercise of it?

As to the first point, although the power is compendiously expressed as relating to all "shares portions and legacies" and is contained in a single clause of the will, it is in fact severable and is a separate power applicable to each share, portion or legacy. That is shown conclusively by the final words of clause 18, where the testator speaks of its being exercised "in respect "of a daughter's share." In relation to Captain Wills' share, the power could only be exercised in his lifetime and before he attained the age of 25, and he was a life in being at the testator's death. If he had died under the age of 25, it would not be true to say that his share accrued to the other shares; his share would have ceased to exist. The testator's daughters and their issue had no interest in Captain Wills' share, and could therefore receive no advancement out of that share. Even if they had such an interest, no advancement could be made in their favour during Captain Wills' lifetime, since they were not the persons *next* entitled to an expectant contingent presumptive or vested share: *In re Winch's Settlement.*[13] We are not concerned to argue whether the power is valid in relation to daughters' shares. "Vested" in clause 18 means vested *in interest*, which is its primary meaning: Theobald on Wills, 11th ed., p. 475. When the interest vests in possession, the power comes to an end. [Reference was also made to *In re De Sommery*[14] and *In re Allott.*[15]] Mr. Edwards' construction would render invalid the statutory power of advancement conferred by section 32 of the Trustee Act, 1925, as well as many express powers in pre-1926 instruments.

As to the second point, a power of this sort should not be so construed by the court as to be a trap for trustees; the testator must be taken to mean what he said. It was argued that in

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[12] [1934] Ch. 112.

[13] [1917] 1 Ch. 633; 33 T.L.R. 213.

[14] [1912] 2 Ch. 622.

[15] [1924] 2 Ch. 498.

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this case the trustees had neither "raised" nor "paid" nor "applied" anything by the execution of the deed of June 15, 1940. Raising is no essential part of the power; it merely gives administrative facility to it. To "raise" means to "lift out of "the general fund of investments," and that is exactly what the trustees did, for the recitals to the deed show that investments were appropriated to Captain Wills' share. The scheduled investments were as effectively raised as if they had been transferred to other persons. The trustees did exactly what they were empowered to do. Under this clause the trustees could either pay or apply, and they did apply. The meaning of those words was considered in *In re Vestey's Settlement*,[16] where allocations by book entry were held to be applications. In that case Lord Evershed M.R. left open the question whether trustees could create elaborate sub-trusts under such a power as this. But it had been held to be a proper exercise of a power of advancement to make a settlement (*In re Halsted's Will Trusts* [17]); and the point was conceded in *In re Ropner's Settlement Trusts*,[18] where Harman J. said the concession was rightly made. The point was fully argued in *In re Meux*,[19] which, although decided on the wording of section 53 of the Trustee Act, 1925, is indistinguishable and binding on this court. [*Roper-Curzon* v. *Roper-Curzon* [20] was also referred to.] *In re Greenslade*,[21] *In re May's Settlement* [22] and *In re Mewburn's Settlement* [23] are irrelevant. The question at issue there was whether the donee of a special power of appointment could give to trustees a power of advancement, the argument against it being that to do so was to delegate the power. In the present case the power given to the trustees was much wider than an ordinary power of advancement and may even be said to have contemplated the making of a settlement. [Reference was also made to *In re Morris*.[24]]

What the trustees did in 1940 was undoubtedly for the benefit of the infant sons of Captain Wills who would have been left without provision under their grandfather's will if Captain Wills had been killed in action before attaining the age of 25. He was serving on the North African front and there was a grave danger that this might happen. The trustees acted wisely and properly in executing the deed, and their action should be upheld. The settlement they made was not an elaborate one; it could not benefit anyone not an object of the power and involved no delegation of the trustees' discretion.

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[16] [1951] Ch. 209.

[17] [1937] 2 All E.R. 570.

[18] [1956] 1 W.L.R. 902.

[19] [1958] Ch. 154.

[20] (1871) L.R. 11 Eq. 452.

[21] [1915] 1 Ch. 155.

[22] [1926] 1 Ch. 136.

[23] [1934] Ch. 112.

[24] [1951] W.N. 412; [1951] 2 All E.R. 528.

Lionel Edwards Q.C. replied.

Cur. adv. vult.

May 23. UPJOHN J. read the following judgment: This summons raises two interesting questions upon the will of the late Frederick Noel Hamilton Wills, deceased, who I will refer to as "the testator." The first question is whether a power of advancement contained in clause 18 of the will is valid or is void for remoteness, and the second question is whether, assuming the power to be valid, a purported exercise of it in 1940 is a valid exercise of that power.

[His Lordship stated the facts and continued:] The issue, therefore, is between the twins on the one hand, who support the validity of the deed of 1940, and the youngest son on the other hand who, of course, takes no benefit thereunder unless both of his elder brothers fail to attain 21. Captain Wills' widow is in the same interest as the youngest son, but she has in fact taken no part in the argument.

Mr. Edwards, for the youngest son, submits that the power contained in clause 18 of the will is void for remoteness on two grounds. First he submits that if you look at the opening words of the clause, it is clear that the power may apply to a vested share where there has been no prior life interest. Therefore it must follow that "vested" must mean not merely vested in interest but vested in possession. Then he submits that on its true construction the clause applies to a son's vested share after it has vested in possession, with this result, that a son on attaining 25 would not have an absolute right to call upon the trustees to transfer his vested share to him because the trustees would be entitled to say, and possibly bound to say, that they would not transfer his share to him because they might desire to exercise the power of advancement in favour of his wife or children. If that be the true construction of the power it may well be that it would infringe the rule against remoteness, but I am quite unable to accept this argument. It is to be observed that the power applies not merely to the sons' shares but to the daughters' shares of residue and to legacies given by the will or any codicil. The opening words of clause 18 were no doubt widely framed to meet a number of possible situations, and I am quite unable to construe the clause as giving the trustees not a power of advancement pending vesting in possession but in effect a power of defeasance which can operate after a share has vested absolutely in possession. A power of advancement is intended to permit the donee of the power to anticipate the absolute vesting of a share, but when the share has vested absolutely the power necessarily comes to an end. In my judgment, "vested" in clause 18 bears its prima facie meaning of vested in interest; see Theobald on Wills, 11th ed., p. 475.

Mr. Edwards' second submission is this. You must look at the state of affairs at the testator's death. At that time no share of residue had vested at all. Then he submits, truly, that for the purpose of the rule you may look at possible events. One possible event would be that the whole share of residue would vest in a daughter. If that happened, he submitted, then in relation to a daughter's share the power of advancement is plainly bad for remoteness. Whether that be so or not I am not going to decide in the absence of the parties directly concerned, but I will assume, for the purposes of argument, that so far Mr. Edwards' submission is sound and that in the case of daughters' shares the power is void. In my judgment, however, that does not in the least invalidate the power in relation to sons' shares. As I have already pointed out, the power applies not only to shares of residue but to legacies given by the will or by any codicil, and it seems to me clear that the power must be looked at in relation to the interest taken by the person who is to be advanced. Under some trusts in the will or codicil it may be that the power is invalid; under other trusts it may be valid. Taking the view that I do, that upon its true construction the power comes to an end in respect of sons' shares as and when each son attains 25, no question of invalidity on the ground of remoteness can arise in relation to a son's share. Accordingly, in my judgment, in relation to Captain Wills' share the power of advancement contained in clause 18 is valid and does not offend the rule against remoteness, and I shall so declare.

I turn to the second question, that is, whether the purported exercise of the power conferred by clause 18 in and by the deed of 1940 is valid. Counsel for the youngest son submits the trustees did not in fact exercise any power under clause 18 at all. He says the trustees raised nothing, paid nothing, applied nothing. All the trustees did was to declare new trusts concerning certain scheduled investments; they advanced nothing. It was argued that in effect they made no application of any investments, but were really only appointing funds upon a contingency which might or might not arise in the future. The question, it was argued, is not whether the objects of the power, the infant children of Captain Wills, obtain some benefit or advantage, but whether funds are applied for their benefit. Counsel referred me to *In re Vestey's Settlement*,[1] where the Court of Appeal held that out-and-out allocations to infants were applications for their benefit, but he points out that Lord Evershed M.R. at the conclusion of his judgment expressly left open the question I have to determine, namely, whether under a power such as I have before me you can create sub-trusts. It was further submitted that if, under a power of advancement, you can in effect alter the trusts or create sub-trusts, a number of the earlier authorities such as *In re May's Settlement*[2] and *In re Mewburn's Settlement*,[3] must have been differently decided. It was submitted that these authorities show that in exercising a power of advancement trustees cannot declare new trusts. Those authorities were, however, really considering a different problem, namely, whether in exercising a power of appointment the appointor might properly include a power of advancement, or whether such inclusion infringed the principle delegatus non potest delegare.

On the other hand, there are a number of reported cases in which the court has held that trustees may properly settle funds advanced under a power of advancement. Thus, in *Roper-Curzon* v. *Roper-Curzon*[4] there was power in a marriage settlement to advance to a son of the marriage "for his advancement or preferment in the world." The trustees applied to the court to know whether they might make an advancement to the son, then married and studying for the profession of the law. Lord Romilly M.R. declined to authorize an advancement unless the son settled the funds advanced. In *In re Halsted's Will Trusts*[5] Farwell J. decided that under a power of advancement contained in a will " . . . for his benefit or advancement in life," trustees might settle a sum on an object of the power in order to provide for his wife and children but upon terms that the settlement was limited to benefit him, his wife and children with an ultimate trust for residue of the testator's estate. In *In re Ropner's Settlement Trusts*[6] Harman J. decided that under a power to apply one-quarter of the trust funds "for the advancement preferment or benefit" of beneficiaries, trustees might properly make settlements upon objects of the power, the main reason being a desire to avoid heavy duties on the death of a man aged 58. However, in that case it was conceded by counsel that it was in the power of the trustees to do so. Wynn-Parry J. has, in effect, twice come to a similar conclusion. First in an unreported case of *In re Tetley*,[7] mentioned in *In re Ropner*,[8] and secondly in *In re Meux.*[9] That decision was upon section 53 of the Trustee Act, 1925, but I think it is clear that Wynn-Parry J. would have come to a similar conclusion upon section 32 of the same Act. I have seen the settlement approved by the judge. It was of the simplest kind and as stated in the judgment,[10] it merely excluded the plaintiff's life interest and substituted an estate tail contingent on attaining 21 for a vested estate tail in the first defendant.

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[1] [1951] Ch. 209; [1950] 2 All E.R. 891.

[2] [1926] 1 Ch. 136.

[3] [1934] Ch. 112.

[4] (1871) L.R. 11 Eq. 452.

[5] [1937] 2 All E.R. 570.

[6] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.

These decisions have been fairly criticized by counsel for the youngest child. In none of them, it was submitted, was there any argument upon whether the transaction amounted to a "raising." In *Roper-Curzon* v. *Roper-Curzon* [11] and *Ropner's* case [12] there was no argument on the power of the trustees to apply funds by making a settlement. Again it was argued that *Roper-Curzon* v. *Roper-Curzon* [13] and *In re Halsted* [14] could be explained on the footing that the settlements were made at the request of the object of the power. It was said that it followed from *In re Ropner* [15] that trustees could take away property from a beneficiary and that could not be right. It is most certainly true that in none of the cases did the court have the benefit of the able arguments which I have had in this case from Mr. Edwards and Mr. Stamp. Nevertheless, so far as this court is concerned, these authorities do establish the proposition that trustees exercising a power of advancement may make settlements upon objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power. What the authorities typified by *In re May* [16] and *In re Mewburn* [17] establish to my mind is that any settlement made by way of advancement upon an object of the power by trustees must not conflict with the principle delegatus non potest delegare. Thus, unless upon its proper construction the power of advancement permits delegation of powers and discretions, a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions, at any rate in relation to beneficial interests, to any trustees or other persons, and in so far as the settlement purports to do so it is pro tanto invalid. I say that without prejudice to the propriety of including an ordinary power of advancement in such a settlement: see *In re Morris.*[18]

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[7] Unreported, Wynn-Parry J., March 31, 1952.

[8] [1956] 1 W.L.R. 902, 905.

[9] [1958] Ch. 154; [1957] 2 All E.R. 630.

[10] [1958] Ch. 154.

[11] L.R. 11 Eq. 452.

[12] [1956] 1 W.L.R. 902.

[13] L.R. 11 Eq. 452.

[14] [1937] 2 All E.R. 570.

[15] [1956] 1 W.L.R. 902.

[16] [1926] 1 Ch. 136.

[17] [1934] Ch. 112.

I must now consider the circumstances of this particular case to see whether the power of advancement has been properly exercised. When the twins were born in 1940 their father was four months short of his 25th birthday and was serving with the Coldstream Guards in the Middle East. If he failed to attain 25, and there was, of course, a serious risk that he might, the fortunes of his wife and young family would be grievously affected. I cannot doubt for one moment that a substantial out-and-out allocation to each infant absolutely (as in *In re Vestey*[19]) under the power of advancement would have been fully justified in the particular circumstances of this case in spite of their extreme youth. The trustees quite properly were considering advancing large sums, the scheduled investments in the deed of 1940 being of the value of £200,000. An out-and-out allocation would, however, have some drawbacks. If one of the twins died in infancy a substantial sum would be payable in estate duty, and the balance would go under the law relating to intestacy, probably to the mother and father or the survivor. The deed of 1940 was an extremely sensible method of overcoming those drawbacks by making the advances take effect contingently on the twins attaining 21. Income would still be available for their maintenance pending vesting. The deed of 1940 was of the simplest kind. It did not attempt to confer any powers or discretions on any persons. It would be very regrettable if some policy of the law authorized an out-and-out advance but not an advancement on trusts where the particular circumstances of the case made that method the sensible and practical way of doing it. Ultimately, however, the question to be answered is this: can this transaction properly be regarded as the raising and payment or application of part of the share of residue to which Captain Wills was then contingently entitled "for the benefit of any child children or "wife" of Captain Wills?

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[18] [1951] W.N. 412; [1951] 2 All E.R. 528.

[19] [1951] Ch. 209.

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In my judgment, the answer is that it was a raising, because the scheduled investments were " raised " in a broad sense by the trustees not by being realized but by being taken out of the trusts of residue and held on new trusts for the benefit of the twins; that cannot be affected by the circumstance that in certain events the trusts might fail and the scheduled investments fall back into residue. Furthermore it was, in my judgment, an application for the benefit of Captain Wills' two eldest children and not a mere appointment of new trusts. Trustees cannot under the guise of making an advancement create new trusts merely because they think they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power. Having reached the conclusion that some application is right and proper, it is, in my judgment, a question to be determined in all the circumstances of the case whether the application should be out-and-out or whether it is desirable to create certain trusts. In this case there was an overwhelming case for an immediate application to protect the twins in case their father should die under 25 and a simple settlement creating contingent interests was the best way of effecting that application. In my judgment, the deed of 1940 was a valid exercise of the power conferred by clause 18, and I shall so declare.

Declarations accordingly.

Solicitors: *Trower, Still & Keeling.*

P. P.

1958
June 19, 20, 21, 24;
July 9.

Harman J.

JOSEPH *v.* NATIONAL MAGAZINE CO. LTD.

[1956 J. 5621.]

Author—Contract to publish article—Specific performance—Article to be written and printed under author's name—Stylistic and factual alterations by editor—Refusal by author to allow publication of revised article—Whether repudiation by author—Submission of alterations by author — Whether author entitled to specific performance.

In June, 1956, the plaintiff, who was an expert on jade, entered into a contract with the defendants whereby an article on jade to be written by him and to appear under his name was to be printed by the defendants in their magazine. On receipt of the plaintiff's article the editor of the defendants' magazine sent it for revision to a free-lance journalist who changed the title and conclusion and made considerable stylistic alterations and certain alterations of fact. The plaintiff refused to allow the article as revised to appear under his name and was unwilling to agree with the defendants' intention to print it with or without his name. Following completion of his original article the plaintiff had submitted certain alterations which he wanted made. In an action for specific performance of the contract and damages for breach of contract:—

Held, (i) that the plaintiff was amply justified in refusing to allow publication under his name of the article as revised and did not therefore repudiate the contract; (ii) that the court could not order specific performance of the contract because the exact terms of the article were never agreed between the parties, but the plaintiff was entitled to damages for breach of contract, as through the defendants' failure to publish the article he had lost an opportunity of enhancing his reputation as an expert on jade.

ACTION.

In this action the plaintiff claimed specific performance of a contract made between him and the defendants, and damages for breach of contract.

The facts are taken from the judgment.

The plaintiff, Louis Joseph, was a dealer in antiques, carrying on business at 28, Knightsbridge. He made a speciality of jade carvings, in which he had been interested all his life, his father having been engaged in the like trade before him. He was a considerable authority on this subject, having talked on it on the television, but he had never written about it. The defendants' magazine " The Connoisseur " was founded in 1901 and occupied a prominent position in its own line. It published nine numbers a year, priced at 10s. in England and two dollars in the United States, and was an elaborate production, the advertising part being about equal to the editorial part, the illustrations in both being of much the same kind and quality. It appeared from the evidence that all the prominent London art dealers advertised in this publication and that to take a page might cost £100, in addition to the cost of the block for producing the illustration. The plaintiff had from time to time so advertised his wares. The defendants' advertising manager, one Law, was well acquainted with the plaintiff and was in his shop about the end of June, 1956, trying to sell advertising space. The plaintiff had recently acquired two green jade plaques which he showed to Law, who tried to persuade him to advertise them with a coloured illustration, which would have cost the plaintiff about £175. The plaintiff did not accept this and inquired whether he could not have his illustration in the editorial part of the magazine. At this point there was a conflict of evidence between the plaintiff and Law, the former saying that Law offered to insert his illustration in the editorial part of the magazine and to procure him what he called a " write-up " by the editor in addition, based on material to be supplied by the plaintiff, at a cost to him of under £100 for the preparation of the necessary photograph and block. Law, however, said that this offer was made on the next day and was agreed to by the plaintiff, and this was in effect the contract alleged in the defence. The plaintiff agreed that there was a second interview on the following day but said that at this interview he refused Law's offer of an editorial write-up which had already been made to him on the day before, but accepted an offer by Law that the proposed illustration should occupy one page in the editorial part of the magazine and should be faced on the other page by a full-page article to be written by the plaintiff and appear under his signature.

On September 1 the plaintiff received the following letter from one Ramsey, the editor of the magazine: " Dear Mr. Joseph, I " believe that you are now nearly ready with the text in reference " to your jade screen. I can use up to 500 words—at some time " within the next two weeks please." This surprised the plaintiff, who had been told that the full-page article would run to at least a thousand words, and he rang up Ramsey on September 3. The plaintiff said that he explained what the bargain was, namely, that he should have a signed article of a thousand words. He said that Ramsey expressed surprise that this was the bargain made, but eventually agreed. His Lordship found that there was a bargain made in June, as the plaintiff said, between himself and Law, and ratified by Ramsey in September.

By September 17 the plaintiff had written his article and gave it to Law, who took it to Ramsey. The plaintiff, however, had second thoughts, and on September 18 he asked for his first version to be destroyed and supplied a new one. It was at this time intended that the article should appear in the October issue, but this intention was changed to November. On receipt of the second article Ramsey, who did not like its style, sent it to a journalist called Staal for revision. He was a free-lance journalist writing about art objects and having some knowledge of jade, but no pretensions to be an expert. He returned the article on September 23 to Ramsey with the following covering letter: " Dear Gwynne, Herewith the revised jade article, which

"I hope you will think an improvement on the original. I have "not changed the general plan, but have translated it from "Knightsbridge-ese into tolerable English, and have excised as "many errors of fact as I could find." On September 26 the plaintiff again became dissatisfied with his second attempt and produced a third. This had small corrections of fact or opinion and it was never considered by Ramsey, who (as his Lordship held) was not bound to consider it, having already started to deal with the article of September 18. On October 15 Ramsey sent to the plaintiff, set up in print in the form in which it would appear in the magazine, the article revised by Staal. The covering letter was in these terms: "I enclose herewith a proof of "your jade article, which I have adjusted in certain places, and "would be much obliged if you could arrange for this to be "returned within the course of a post or two." This was a shock to the plaintiff and he at once wrote the following letter: "As "soon as I received a proof this afternoon sent under cover of "your letter of even date, I unsuccessfully tried to contact you "by telephone. You seem to have ignored my manuscript sent "to you on September 26 which corrected the one sent on "September 18. The article as you have re-written it includes "twenty-three errors of fact and technical errors which were in "neither of my manuscripts. You will therefore appreciate that, "apart from the point that the altered title and text have taken "away my theme, I cannot allow my name to appear under the "article in its present form. Further, I am not agreeable to the "publication of an article based on my article without my name, "as this inclusion was an essential part of our arrangement." Either Ramsey on this occasion or Law on his behalf a day or so later informed the plaintiff that the defendants intended to publish Staal's revision either with the plaintiff's name on it or without. The plaintiff was unwilling to agree to either of these courses and it was said that this constituted a repudiation of the agreement which released the defendants from liability.

On November 17, the plaintiff issued a writ claiming specific performance of the contract, which by his statement of claim he alleged was concluded between himself and Law, on behalf of the defendants, in June, 1956, and damages for breach of contract. By their defence the defendants alleged that the plaintiff had repudiated the contract, and counterclaimed to recover the expense of making certain blocks to illustrate the article.

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F. E. Skone James for the plaintiff. On the evidence there was a contract made between the parties that the defendant company would publish in their magazine an article on jade to be written by the plaintiff and to appear under his name. The plaintiff was entitled to refuse to correct the proof of the article as altered by the defendants' editor because the alterations in the theme and style were such that he could not be expected to allow them to be published under his name. His refusal to allow the article to be printed under his name did not, therefore, amount to repudiation of the contract.

The next question is whether the plaintiff, if he succeeds, is entitled to specific performance of the contract or damages only. An author is entitled to specific performance against a publisher: *Barrow* v. *Chappell & Co. Ltd.*[1] A plaintiff is always entitled to specific performance when damages are not adequate: *Carpenter's Estates Ltd.* v. *Davies.*[2] This principle is not confined to contracts for the sale of land: see Fry on Specific Performance, 6th ed., p. 28.

R. W. Goff Q.C. and *G. M. Parbury* for the defendants. The terms of the contract were not as alleged by the plaintiff. They were that the plaintiff should supply notes on which the defendants would write an article. It was not to be written in his name. In any case some rights of editing must be inherent. If that contention is right the plaintiff fails. If the agreement was as the plaintiff alleges, then it is submitted that he had no right to refuse to allow the article which the defendants proposed to print to appear under his name, and by so refusing he wrongfully repudiated the contract.

If the plaintiff is entitled to any relief he cannot obtain specific performance and the damages should be merely nominal. Specific performance should not be granted for the following reasons: the contract is not sufficiently precise and is too personal for the court to supervise; there is want of mutuality; and damages afford an adequate remedy (always bearing in mind that the question here is one of advertising and not the reputation of the plaintiff as an author). *Barrow* v. *Chappell & Co. Ltd.*[3] is distinguishable. There the musical composition had already been written; therefore, it was clear what had to be done and there was no personal element. Further, there was there the question of publicity for the plaintiff as a composer; in such a case damages may well be an inadequate remedy. *Carpenter's Estates* v. *Davies*[4] is also distinguishable. Specific performance was granted because there the works were clearly defined and damages were not an adequate remedy. As to want of mutuality, it is clear that the defendants could not obtain specific performance against the plaintiff of a contract to write an article: see Fry on Specific Performance, 6th ed., p. 219. In any case it is now too late for specific performance. The caption and article would both have to be altered and, although physically possible, that would not be carrying out the contract, which was primarily to advertise the jade plaques.

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[1] Danckwerts J., 1951, unreported.

[2] [1940] Ch. 160; [1940] 1 All E.R. 13.

[3] Danckwerts J., 1951, unreported.

F. E. Skone James in reply. Mutuality has to exist at the date of the trial but not at the date of the contract. Fry on Specific Performance, 6th ed., p. 222, refers only to cases where mutuality is lost but not gained. Here, once the article was written, the publisher could obtain specific performance against the author. Therefore there is no want of mutuality. Here, damages are not an adequate remedy, and the loss of publicity to the plaintiff is difficult to assess. Loss to the plaintiff of publicity, though difficult to assess, is a measure of damage: *Clayton and Waller* v. *Oliver.*[5]

Cur. adv. vult.

July 9. HARMAN J. read the following judgment. [His Lordship stated the facts and his findings and continued:] In my judgment there was a contract made by Law with the plaintiff at the end of June and ratified by Ramsey at the beginning of September that a full-page illustration in colour of the plaintiff's plaques should appear in the editorial part of the magazine and that opposite should be a full-page article written and signed by the plaintiff. Now it appears that a page of "The Connoisseur" takes about a thousand words. The article tendered by the plaintiff contained some 1,220 words, and the plaintiff admits that it was within the competence of the editor to curtail the article so as to go onto a page. What the plaintiff denies is the defendants' right to have revisions made such as were here made by Ramsey and Staal, these including the title and the conclusion, a number of alterations of fact and, above all, stylistic alterations. In my judgment, the plaintiff was amply justified in refusing to allow to be published under his name and as his work the article as revised by Staal. I can see no justification for the contention that an editor may alter the matter and the manner of a signed article in this way. Style is, I suppose, a matter of taste. Ramsey said that the plaintiff's article was not in "The "Connoisseur" manner and he preferred Staal's production. For myself, I think it was greatly inferior, being written in the kind of journalese which alters the words "before burial" to "prior "to interment." However that may be, the plaintiff was entitled to write his own article in his own style, expressing his own opinions, and was not bound to submit to have his name published as the author of a different article expressing other opinions in a different style. In my judgment, therefore, the plaintiff did not repudiate the contract. It is true the plaintiff is not a professional writer and that it was his reputation as a connoisseur in jade which he wished to enhance; but, having regard to the contract made, he was entitled to do this in his own way.

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[4] [1940] Ch. 160.

[5] [1930] A.C. 209.

It remains to consider what remedy the plaintiff is entitled to have. He claims specific performance, but it is not his wish to have the article of September 18 (the second version) published as it stands but to have it published with the small corrections included in the third version, that of September 26, so that there never was an agreed subject-matter for publication. The plaintiff sought to pray in aid *Barrow* v. *Chappell & Co. Ltd.*,[1] in which specific performance was decreed for the publication of a piece of music, but in that case the music had been composed and performed on more than one occasion before the agreement was made and the defendants offered in court to publish the music if the judge found there was a contract. This is a very different case. There never was, as I pointed out, a specific article which the defendants agreed to publish. The defendants argued that there was no mutuality because at the time that the contract was made the subject-matter of the contract was not in existence and the defendants could not have compelled the plaintiff to write the article. As to this, I am of opinion that it is not essential that the subject-matter of the contract should be in the plaintiff's possession or power when the contract is made. It is enough if he is able to produce it before the date when performance is due. This at least is true of a chattel. But in this case the exact terms of the article were never agreed on between the parties, and the court would be called on to supervise the editing of the article, whether that of September 18 or 26, by any necessary curtailment or correction of mistakes or possibly grammatical changes which an editor may legitimately make. In my judgment, therefore, this is not an agreement of which specific performance can be ordered by the court.

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[1] Danckwerts J., 1951, unreported.

There remains the question of damages. As to this, the defendants argue that publicity being all that the plaintiff sought, he could have had all the publicity he wanted if he had agreed to Staal's article going out under his name, and therefore nominal damages only can be awarded. I do not accept this. The plaintiff's object was not to advertise his plaques but to enhance his own reputation as an expert in jade, and this, as I have said, he was entitled to do within reasonable limits in his own way. Indeed, I cannot but think that he was justified in his notion that Staal's article published under his name would not be a help to him but the reverse. The quantum of damage in such a case is and must remain more or less a matter of guesswork. It would undoubtedly be a feather in the plaintiff's cap to have a signed article published in the editorial pages of this magazine. He has lost that advantage. The measure of damage is not susceptible of accurate assessment. I see no object in sending the question to inquiry, for I do not think that any evidence would help towards quantifying it. In the absence of a jury, I must do the best I can, and I assess the damages at £200, for which sum there will be judgment for the plaintiff. In addition, he is entitled as special damage to the amount he expended on having the photograph taken, which was 15 guineas.

As to the counterclaim, the defendants, in accordance with the contract, had the blocks made for the purpose of illustrating the plaques, and this cost £57 0s. 9d., and it is argued that this sum must be set off against the damage awarded to the plaintiff. In my judgment this is not so. The plaintiff's promise to defray this expense was conditional upon the illustration appearing in the magazine with his name attached to it. Owing to the defendants' breach of contract, this has not come about. If the plaintiff had paid for the production of the blocks, he could, in my judgment, have recovered that sum in addition to the cost of the photograph. As he has not been put to this expense, he cannot recover it; but, in my judgment, neither can the defendants. I dismiss the counterclaim with costs.

Judgment for the plaintiff.

Solicitors: *Drury, Hopgood & Co.; Frederick Wills & Co.*

P. P.

1957
Dec. 18,
19, 20.

Upjohn J.

C. A.

1958
June 9,
10, 11;
July 7.

Jenkins,
Parker and
Pearce L.JJ.

JENNINGS *v.* KINDER (INSPECTOR OF TAXES).
HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES.

Revenue—Income tax—Employment—Collateral agreement—Scheme by employer to provide housing assistance to employees—Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156 (2), *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

Revenue—Income tax—Expenses—Benefit to employee—Whether reimbursement on loss on sale of house an "expense"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 160.

Imperial Chemical Industries Ltd. was a very large company owning numerous factories in different places, and employing a very large staff, many of whom were required by their service agreements to be prepared to serve the employers wherever required. In order to assist in the housing of married male employees of certain grades, and to facilitate their transfers, the employers designed a scheme whereby they assisted by interest-free loans to a certain extent towards the purchase of houses by such staff. The scheme further provided, inter alia, that if on transfer the employee wished to sell or let his house, he was to give an option to the employers to purchase it at a fair valuation; if the option was refused, he was free to sell it, but in either case the employers guaranteed him against any capital loss, provided that the house had been maintained in good repair. Employees who accepted the scheme were required to enter into formal agreements, the terms of which were in accordance with the provisions of the scheme.

M. was employed from 1941 under various contracts requiring him to work at such of their factories as I.C.I. should direct. In 1951 M. entered into an agreement with his employers pursuant to the housing scheme. M., in pursuance of that agreement, bought a house for £1,850, of which £300 was advanced to him by the employers by way of interest-free loan. On his transfer to another factory in 1954 M. sold the house with the consent of the employers for £1,500, and they paid him the sum of £350 to compensate for his loss. M. was assessed under Schedule E [1] to income tax on the sum of £350:—

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[1] Income Tax Act, 1952, s. 156 (2): "Tax under this Schedule shall "also be charged in respect of any "office, employment or pension the "profits or gains arising or accruing "from which would be chargeable to "tax under Schedule D but for the "proviso to paragraph 1 of that "Schedule."

S. 160 (1): "Subject to the provisions of this Chapter, any sum paid "in respect of expenses by a body "corporate to any of its directors or "to any person employed by it in an "employment to which this Chapter "applies shall, if not otherwise "chargeable to income tax as income "of that director or employee, be "treated for the purpose of paragraph 1 of Schedule 9 to this Act "as a perquisite of the office or "employment of that director or

Held, by Upjohn J., that he was not taxable on the sum of £350 under Schedule E, since that sum was not a profit arising from his employment, but something wholly collateral.

J., who was employed by the same employers, joined the housing assistance scheme and purchased a house, in which he was living when he was required by his employers to go to a new place of employment. He sold his house and suffered a loss of £450, which was reimbursed to him in accordance with the scheme. As a person to whom the Income Tax Act, 1952, s. 160, applied, he was assessed to income tax on the sum of £450 as being "paid in respect of "expenses" and as such being a perquisite of his employment:—

Held, by Upjohn J., that a loss on sale of a house was not an "expense" within the normal meaning of the word or within the Income Tax Act, 1952, s. 160 (1), and, accordingly, the sum was not assessable to tax.

On appeal:—

Held, in both cases, (1) that the question of liability to tax depended on whether or not the payment made under the guarantee was made to the employee in that capacity and for no consideration other than services; (2) by Jenkins and Pearce L.JJ. (Parker L.J. dissenting) that, although the agreement was entered into by the employee in his capacity as such, it was a genuine bargain advantageous to both parties, under which the employee gave good consideration for the benefits received, so that it should be regarded as collateral and made for a consideration other than the employee's services. Accordingly, no tax was chargeable.

Dictum of Stirling L.J. in *Herbert* v. *McQuade* [1902] 2 K.B. 631, 650; 18 T.L.R. 728 applied.

Per Jenkins L.J. The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss. To segregate the benefit (in cases in which it is material) from the burden, and to ignore the cost to the employee of obtaining it, in the shape of the purchase money he has laid out on the faith of the scheme and agreement, and lost through the depreciation in value of the house, ignoring also the other forms of consideration moving from the employee, and thus to arrive at the conclusion that the sum paid by the employers under the indemnity by way of recoupment for that loss is a profit of his employment, as being a sum received for no consideration other than services, appears to me to involve a considerable distortion of the facts.

Per Pearce L.J. If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee

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"employee and included in the emoluments thereof assessable to income "tax accordingly: Provided that "nothing in this subsection shall "prevent a claim for a deduction "being made under paragraph 7 of "the said Schedule 9 in respect of "any money expended wholly, exclusively and necessarily in performing "the duties of the office or employment."

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in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thus making him a more contented worker), and that the employee gives a genuine and appreciable consideration, then that is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. . . . Perhaps a convenient test might be this: Is this a scheme that could commend itself on its merits to a director who thinks that the company's employees are already adequately paid, and does not intend to do anything for the mere purpose of giving them additional financial benefits?

Per Parker L.J. There is no substantial consideration apart from services. . . . Not only is the object of the agreement to improve the services which the employee is giving, but in my judgment the indemnity is given in consideration of those services just as if the service agreement had itself provided that the remuneration was to include the benefits under any housing agreement.

Per totam curiam. The principles applicable are well settled; the difficulty is to apply them to the facts of particular cases.

Decision of Upjohn J. affirmed.

CASES STATED by General Commissioners for Income Tax.

HOCHSTRASSER (INSPECTOR OF TAXES) v. MAYES.

This case, which was argued first, was an appeal by Eric John Lazare Hochstrasser (Inspector of Taxes) against a decision of the General Commissioners of Income Tax for Langbaurgh East, Yorkshire, disallowing an assessment to income tax made on Leonard Harry Mayes under Schedule E in the sums of £1,170 which included the sum of £350 paid or credited to him by his employers under their housing assistance scheme.

The following facts appear from the case stated. Since December, 1941, Leonard Harry Mayes had been an employee of Imperial Chemical Industries Ltd., and immediately before September, 1950, he had been employed by them at Welwyn, Herts. He was then transferred to their factory at Hillhouse, Lancs, and on April 27, 1951, he entered into a service agreement with his employers. At or about this time the scheme operated by his employers to provide assistance with the purchase of housing for their married male staff came to his notice, and on June 1, 1951, he entered into an agreement based on that scheme with his employers. The agreement was a lengthy document which carried out in great detail the provisions of the scheme. In so far as is material, the housing scheme provided that the employers were prepared to offer their employees assistance in the purchase of a house provided that the price was within certain limits. It stated that the company were prepared to make an interest-free loan to an amount which varied in relation to gross Imperial Chemical Industries Ltd. emoluments, and set out the terms of the loan, which was to be secured by a mortgage of the house; where there was a first mortgage by a building society or a private lender, the interest-free loan was to be secured by a second mortgage. In cases where the employee financed the purchase, it would be a first mortgage. By paragraph 2 of the scheme: " It is not the present intention of the " company to require the interest-free loan to be repaid until the " expiration of fifteen years," or the earlier of the following events: transfer by the company to a new locality so that the employee ceased to reside in the house, or giving up possession of the whole or any part of the house, or retiring from the service on pension, or leaving the company's employment or death. The scheme continued: " Subject to your maintaining the house in " good repair, the company will guarantee you against loss or " depreciation of the house on the following terms: 1 (*a*) The " value of the house on the happening of any of the following " events, namely: (i) If you are subsequently transferred by the " company and you wish to sell or let the house: (ii) If you " die whilst in the service of the company: (iii) If you retire " on pension. (*b*) In the event of your being transferred by the " company, and by reason of such transfer you wish to sell or " let the house, you will offer the house to the company who " will have the right to buy it at a valuation price. If the house " is purchased by the company and the valuation price is less than " the original cost price plus improvement costs, the difference is " made up by the company under guarantee. If the house is " not purchased by the company, the provisions of the two " following sub-clauses (*c*) and (*d*) will apply. (*c*) If the house " is sold within one year after such one of the three events " mentioned in (*a*) above as shall first happen and the sale is a " bona fide sale at the best price reasonably obtained and is not " for the purpose of a speculation, the company will pay you or " your executors or administrators, in the case of your death, " the amount (if any) by which the sale price is less than the " original cost price, together with improvement costs. (*d*) If the " house is not sold within one year, a valuation is made at the " end of that year and if the valuation price is less than the " original cost price, plus any improvement costs, the company " will pay the difference."

The scheme further provided that where the employee desired to sell his house for his own reasons, but not for one of the reasons set out in paragraph 2 above, that the company would consent to the sale if good and sufficient reasons were given, and if there were a loss, that the company would bear that loss.

In June, 1951, Mayes bought a house at No. 16, Ribble Road, Fleetwood, for the sum of £1,850. Of this amount £90 was provided by Mayes, £1,460 was borrowed on a first mortgage from the Abbey Building Society and £300 was borrowed on a second mortgage from his employers, who paid all legal costs including stamp duties, together with the expense of removal from Welwyn to Fleetwood. In October, 1954, Mayes was transferred to Wilton, Yorks, and, in accordance with the housing agreement, offered his house to the employers, who declined to accept it. With their consent, the house was sold for £1,500 and the loss of £350 was made good to Mayes by the employers. The commissioners found that the terms of Mayes' employment were completely independent of the housing agreement and that salaries paid by Imperial Chemical Industries Ltd. compared favourably with salaries paid by other employers not operating a housing scheme.

The contentions made before the commissioners on behalf of Mayes were that any benefit received by him under the housing scheme was to meet a loss of capital, and as such was not taxable, and further that if there had been any taxable benefit it should have been assessed for the year 1950–51. The Inland Revenue contended, however, that the sum of £350 represented a profit from Mayes' employment for which he was chargeable to income tax and that no deduction could be allowed in respect of it under rule 7 of Schedule 9 to the Income Tax Act, 1952. The commissioners decided that the £350 was a payment made against a capital loss and was not therefore taxable.

JENNINGS v. KINDER (INSPECTOR OF TAXES).

In this case Charles Maurice Jennings appealed from a decision of the General Commissioners of Income Tax for Stockton Ward, County Durham, against an additional assessment in the sum of £450 made on him under Schedule E to the Income Tax Act, 1952, for the year 1953–54.

The facts in this case were admitted to be as follows: Jennings joined Imperial Chemical Industries Ltd. in July, 1944, when he was living in London. In January, 1949, he was transferred to Wilton, Yorks, and in April, 1952, he was again

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transferred to Billingham, Durham, and on each occasion he acquired a house under his employers' housing assistance scheme. On the first transfer he sustained a loss of £80 which was made good to him in accordance with the scheme. On the second transfer he again sustained a loss and the sum of £450 was paid to him. In both cases his costs and removal expenses were paid by the employers. When Jennings began his employment in 1944 he did not know of the housing scheme and was not thereby moved to join because of it. If there had been no such scheme he would still have been employed by Imperial Chemical Industries Ltd. and he considered that his remuneration was adequate for the work which he did. It was further admitted that an employee's salary was calculated independently of any benefits which he might derive from the housing scheme, and that the sum of £450 was not salary for services under Jennings' service agreement with his employers.

It was contended on Jennings' behalf that the sum of £450 received by him was to meet a capital loss sustained by him and was therefore not taxable, and further that any benefit accruing to him under the scheme was not a reward for his services. It was also contended that if any benefit under the housing scheme was a taxable emolument, the like amount was wholly and exclusively and necessarily expended by Jennings in the performance of the duties of his employment, and that, therefore, no taxable profit emerged.

On behalf of the Inland Revenue it was said that the sum of £450 represented a profit or emolument of the taxpayer from his employment and was in the nature of income, and was accordingly assessable to tax under Schedule E and Schedule 9, rules 1 and 4, of the Income Tax Act, 1952, and that an additional assessment in respect thereof was properly made on him for the year 1953–54, and, further, that if tax was chargeable, no reduction in respect of the £450 was allowable under rule 7 of Schedule 9, in that any expense incurred by Jennings in selling his house was not incurred wholly, exclusively and necessarily in performing the duties of his employment. The commissioners upheld this contention and were also of opinion that the loss on the sale of the house in 1953 was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment held by Jennings within the meaning of rule 7 of Schedule 9 to the Income Tax Act, 1952, and accordingly they confirmed the additional assessment.

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In both cases the commissioners found that the employers instituted the scheme to secure a contented and therefore efficient staff, it being well recognized that the transfer of a married man from one district to another without the assistance of such a scheme would involve him in worries and financial embarrassments.

The terms of the agreements entered into by employees under the scheme were summarized as follows by Jenkins L.J.:

The guarantee was to operate:

(i) In the event of the employee being transferred to a new place of employment in the service of I.C.I. and consequently desiring to sell or let the house. In that case the employee must offer to sell the house to I.C.I. If I.C.I. accepted, then the house was to be bought by I.C.I. at the current market value ascertained by valuation; and if such value was less than the employee's expenditure on the house I.C.I. became liable to pay the difference to the employee. If I.C.I. declined, then the employee was at liberty to sell to a third party and I.C.I. became liable to pay the employee the amount if any whereby the price realized fell short of his expenditure on the house (clause 2).

(ii) In the event of the sale of the house by the employee or his personal representatives within 12 months after (a) the refusal by I.C.I. of an offer made on transfer under (i) above or (b) the retirement of the employee or (c) the death of the employee (whichever first happened) I.C.I. became liable to pay to the employee or his personal representatives the amount if any whereby the price realized on such sale fell short of the employee's expenditure on the house (clause 3 (1)).

(iii) If the house was not sold before the expiration of the period of 12 months mentioned in (ii) above, then there was to be a valuation of the house and I.C.I. became liable to pay to the employee or his personal representatives the amount (if any) whereby the employee's expenditure on the house exceeded the amount of the valuation (clause 3 (2)).

(iv) If at any time before such one of the three events mentioned in (ii) above as should first happen the employee while still in the service of I.C.I. desired to sell the house he might do so, but in that case he was only to be entitled to the benefit of I.C.I.'s guarantee against capital loss if he obtained I.C.I.'s consent to the sale and offered to sell the house to I.C.I. If I.C.I. accepted the offer, then the house was to be bought by I.C.I. on similar terms to those stated in (i) above (i.e., with the benefit of the guarantee). If I.C.I. declined the offer, then the employee might sell to whom he pleased and I.C.I.'s guarantee was to apply to any resulting capital loss (clause 4).

The agreement was to continue in force for a period expiring 12 calendar months after the death of the employee, but subject to fulfilment of accrued rights it ceased automatically upon such one of the following events as should first happen, that is to say if the employee should: (A) Be transferred for service with I.C.I. elsewhere and offered to sell the house to I.C.I. (B) Retire from the service of I.C.I. on pension. (C) Cease to be employed by I.C.I. for any other reason. (D) Sell or let the property or any part thereof. (E) Cease to use the house as a permanent residence (clause 11).

It was a condition precedent to I.C.I. affording to the employee a guarantee against any capital loss he might suffer that the employee should at all times keep the house in good tenantable repair (clause 6).

In Mayes' case the Crown and in Jennings' case the taxpayer appealed. The following were the arguments before Upjohn J. in Hochstrasser's case.

John Pennycuick Q.C. and *Alan Orr* for the Crown. The Crown seeks to tax the loss of £350 as being a "salary, fee, "wage, perquisite or profit arising" within the Rules applicable to Schedule E, r. 1, of the Income Tax Act, 1952. If transactions for full value between employer and employee are excluded, the consideration being something other than services, it appears that every payment by an employer to an employee must either be a gift to the employee in his personal capacity and not in his capacity as an employee, in which circumstances the gift would not be taxable, or it must be a payment to him as an employee because he fulfils an office or employment; in those circumstances such a payment is taxable. It follows that every payment, not being a transaction for full consideration in money's worth, to an employee, is a profit from his office and is taxable, unless that payment is personal to him. The fact that Mayes entered into the housing agreement and received a payment thereunder shows that the payment was a profit arising from his office. If he were not employed, he would never have entered into the contract, which was offered to him as an employee and not in a personal capacity. Any moneys accruing to him under the contract must accordingly be taxable. These premises appear from the following cases: *Herbert* v. *McQuade*[2]; *Blakiston* v. *Cooper*[3]; *Seymour* v. *Reed*.[4]

F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayer. The payment of £350 does not arise from Mayes' office or employment, because it is not a profit; it is not a reward for his services and is therefore not a profit which arises from his employment. A profit or perquisite must, of its nature, arise as a reward for past, present or future services: see *Hunter* v. *Dewhurst*.[5] It appears from *Prendergast* v. *Cameron*[6] that a payment may be made to an employee in connexion with his office which might well not fall into the category of a profit from his office. In *Beak* v. *Robson*[7] it was said that each case must depend upon its own facts, and it is not every payment made to a director which accrues to him as a profit from his office. *Tilley* v. *Wales*[8] gives a further example of this. From *Moorhouse* v. *Dooland*[9] it is clear that the question whether a given receipt is a profit of employment must be decided from the standpoint of the recipient. It is submitted that the true test in this kind of case is that enumerated by Morris L.J. in *Bridges* v. *Hewitt*,[10] namely, that the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in that office.

The following were the additional arguments in Jennings' case.

John Pennycuick Q.C. and *Alan Orr* for the Crown. The arguments already advanced in Mayes' case apply in Jennings' case, since the two are indistinguishable except that here section 160 of the Income Tax Act, 1952, applies to the taxpayer. The sum of £450 was paid to him in respect of expenses and is therefore taxable under the section.

F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayer. Clearly the £450 is not an expense of the taxpayer within the year of assessment, for on the facts he has not been put to any expense in that year. He has merely made a loss on the sale of his house, and that cannot be considered an expense.

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[2] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

[3] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

[4] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.

[5] (1932) 16 T.C. 605.

[6] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; 23 T.C. 122.

[7] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.

[8] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[9] [1955] Ch. 284; [1955] 1 All E.R. 93; 36 T.C. 1.

[10] [1957] 1 W.L.R. 674, 698.

UPJOHN J. I have before me two appeals by way of case stated from the General Commissioners for Income Tax: one by the Crown and one by the subject. Both raise precisely the same point and they are in their essential facts indistinguishable one from the other, save that in Jennings' case an additional point arises on section 160 of the Income Tax Act, 1952. The appeals raise, to my mind, novel and important points. In Mayes' appeal the commissioners for a division of York decided in favour of the subject, and in Jennings' appeal on the very next day the commissioners for a division of Durham decided in favour of the Crown. I propose to take Mayes' case first, as upon its facts it is the simpler.

HOCHSTRASSER (INSPECTOR OF TAXES) v. MAYES.

[His Lordship stated the facts and continued:] In the case reference is made to a written agreement of employment dated April 27, 1951. As will be seen from what follows, that date gives rise to certain difficulties, but it has this morning been agreed that the Crown will accept the statement made by Mr. Bucher for the respondent Mayes upon instructions that, although that was his first written agreement, he was employed under earlier oral contracts, and one of the terms of those contracts was that he was obliged to move to such of his employers' factories or offices as they should from time to time direct. [His Lordship then read the material parts of the scheme and continued:] Very briefly, the effect of this scheme if you entered into it was that you purchased a house with or without the assistance of an interest-free loan according to your desires. The company, in the events I have mentioned, would guarantee you against loss, that is to say, if there was a transfer to another place you had to offer the house to the company, who might buy it. If they did not buy it, if the house was sold within a year and there was a loss, the company paid you the amount of the loss. If there was no sale, then at the end of the year there was a valuation, and the company would pay you the amount of the loss as estimated by the valuation. That was how the scheme worked. It was, of course, purely optional whether the employee entered into it or not.

Of course, no one doubts that the scheme was introduced to benefit both employer and employee. The scheme was introduced in 1948, when housing conditions were more difficult even than they are now, and it is quite clear from the evidence that was given before the commissioners, and from their findings, that the principal object of introducing this scheme was so that the employee should be free from worry on transfer. He knew that if he was transferred away he could if he liked go into the scheme, and he could be guaranteed against loss. The advantage to Imperial Chemical Industries was twofold. They had more contented employees, and, of course, they also had the call on the house when the employee left it on transfer or death, and that might be quite valuable, because they could then offer the house to the person coming in to take the place of the employee who was transferred, and they could offer him accommodation which might otherwise be difficult to get.

The assessment is made upon the respondent Mayes under Schedule E. The charging section is section 156, which at the relevant time before it was amended in 1956 provided: "The "Schedule referred to in this Act as Schedule E is as follows: "... (2) Tax under this Schedule shall also be charged in respect "of any office, employment or pension the profits or gains arising "or accruing from which would be chargeable to tax under "Schedule D but for the proviso to paragraph 1 of that Schedule." It is not disputed that the tax is charged upon the respondent under that paragraph. The first of the rules which by section 156 (5) are applicable to a charge under Schedule E provides: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect" —now these are the important words—"in respect of all salaries, "fees, wages, perquisites or profits whatsoever therefrom for the "year of assessment, after deducting the amount of duties or "other sums payable or chargeable on the same by virtue of any "Act of Parliament, where the same have been really and bona "fide paid and borne by the party to be charged." It is this loss of £350 payable which the Crown seek to tax as being a salary, fee, wage, perquisite or profit arising "therefrom" for the year of assessment. As I have said, in Mayes' case they failed. In Jennings' case they succeeded.

The argument on behalf of Mayes is this: He says that his payment of £350 does not arise from his office or his employment because it is not a profit; it is not in any sense a reward for services, and therefore he says it is not a profit that arises from the employment. A profit or perquisite, it is submitted, must essentially arise as a reward for services, whether past, present or future. The Crown, on the other hand, offer a dichotomy. It is submitted that if you leave out transactions for full value between employer and employee, the consideration being something other than services, for example, the purchase for full value in money or money's worth of an employee's house or a motor-car, you find upon the authorities that every payment by an employer to an employee must either be a personal gift, that is, a gift to an employee on grounds personal to him and not to him qua employee, when admittedly it is not taxable, or a payment to him as an employee and because he fulfils some office or employment, in which case it is a profit from the office or employment, and is taxable. Mr. Pennycuick says that putting it the other way round and leaving out of account transactions for full consideration in money's worth, every payment to the employee is a profit from his office and taxable unless personal to him, and it is said that all the authorities show that.

With all respect to the argument of the Crown, I do not think they show any such easy dichotomy. In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future. I venture to think that the Crown's argument is based on a misinterpretation of some of the authorities, and for this reason, that in so many cases on this much litigated branch of the law it was clear from the very nature of the payment that it was in respect of services, and the whole question was whether it was a profit from the employment or a personal present, and the possibility of its being a payment not in connexion with services simply did not arise. For that reason, the point which is in the forefront of this case frequently did not rise to the surface in many of the well-known cases.

Having expressed my view on the law, I turn to the authorities which seem to me to justify that view. The first is

Hunter v. *Dewhurst*.[1] That is a difficult case which has been the subject of subsequent judicial comment. I read the part of the headnote relating to *Dewhurst's* case: "The respondent desired "to retire from active management of the company, but his "co-directors wished to be able still to consult him, and it was "agreed that he should resign the office of chairman, receive as "'compensation' a lump sum in lieu of the provision under "article 109, waiving any future claim under that article, and "remain on the board . . . at a reduced rate of remuneration." It was held in the House of Lords that in the circumstances of that case the sum received was not assessable to income tax. Lord Atkin said this[2]: "This sum is expressed in the article to "be 'by way of compensation for the loss of office.' I will "assume, without expressing any opinion on the matter, that this "sum, if received by any ex-director, would fall within the words "'salary or profit whatsoever' and would come 'from' the office "of director, as being part of the remuneration which he was "entitled to under his contract of employment. But the cir- "cumstances in which the first payment was made seem to me "to negative the proposition that the payment was received "'from' the office. Rule 1 appears to me to indicate emolu- "ments either received from the employer or from some third "party (such as tips, permitted commission and the like) as a "reward for services rendered in the course of the employment." That is, I think, a helpful expression of opinion upon the general scope of rule 1.

The next case is *Prendergast* v. *Cameron*.[3] In that case a director received the sum of £45,000 in consideration of which he did not resign from his office of director, and it was held that that sum was properly assessable as a profit arising from the office of director under Schedule E. Lord Maugham said[4]: "On "these facts and findings, the question is whether the £45,000 "was paid to the appellant in his capacity as a director and to "induce him to continue to hold his office of a director, so that "the sum comes within the charging words of rule 1, of Schedule "E, 'all salaries, fees, wages, perquisites or profits whatsoever "'therefrom' (that is, from the office of a director), or whether "the sum was paid merely to obtain his agreement not to serve "the notice for, say, one day, leaving him perfectly free to retire "on the next day, in which case the sum, as the Master of the

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[1] (1932) 16 T.C. 605.

[2] Ibid. 644.

[3] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; 23 T.C. 122.

[4] [1940] A.C. 549, 557.

"Rolls held, would not be profit arising from the office." So Lord Maugham is there quite clearly saying that a payment might have been made to him in connexion with his office of director which might well not fall in the category of a profit from his office at all.

The next case is *Beak* v. *Robson*.[5] In that case the respondent director covenanted in consideration of the payment of £7,000 that he would not compete with the company when his employment had come to an end within a radius of 50 miles, and it was held on assessment under Schedule E for £7,000 that it was a payment for giving up a right wholly unconnected with his office and operative only after he ceased to hold that office, and the assessment was discharged. Lord Simon said[6]: "The considera-"tion which he has to give under the covenant is to be given "not during the period of his employment, but after its termina-"tion. He is giving to the company for a sum of £7,000 the "benefit of a covenant which will only come into effect when "the service is concluded. I agree with Lord Greene M.R. in the "view that to treat this £7,000 as a profit arising from the respon-"dent's office 'is to ignore the real nature of the transaction.' "It is quite true that, if he had not entered into the agreement "to serve as a director and manager, he would not have received "£7,000. But that is not the same thing as saying that the "£7,000 is profit from his office of director so as to attract tax "under Schedule E." Lord Simon there quite plainly is saying that you must look at the facts of every case, and it is not every payment that is made to a director which accrues to him as a profit from his office. That actual decision is no longer the law, because the law has been altered by statute, but that does not affect the value of Lord Simon's statement.

The next case is *Tilley* v. *Wales*,[7] where a director was assessed under Schedule E in the sum of £40,000. Part of that was to commute his salary and part was capitalization of a pension. In the House of Lords it was held, as appears from the headnote, "that so much of each payment of £20,000 in the "years 1938–39 and 1939–40 as represented a sum paid in com-"promise of reduction of salary was assessable to Income Tax "under Schedule E, *Prendergast* v. *Cameron*,[8] but so much as "represented capitalization of pension was not so assessable,

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[5] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.

[6] [1943] A.C. 352, 355.

[7] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[8] [1940] A.C. 549.

"*Hunter* v. *Dewhurst*.[9] The case was remitted to the special "commissioners to apportion the two payments accordingly." That, again, is another example of a payment to a director part of which was a profit from his office and part of which was not.

The next case is *Moorhouse* v. *Dooland*.[10] That was the case of the cricketer's benefit. I only desire to refer to the judgment of Jenkins L.J.[11] He said this: "I hope I will not be thought "to undervalue these arguments if I say that I regard them as "disposed of by the application of the principle that the question "whether a given receipt is a profit of an employment must be "decided from the standpoint of the recipient."

Then, finally, there is the recent case of *Bridges* v. *Hewitt*.[12] In that case certain shares were transferred to the directors in consideration of their serving the company for four years thereafter. There was a difference of opinion, and Jenkins L.J. delivered a dissenting judgment agreeing with the judgment of Danckwerts J. in the court below. But nevertheless he made a helpful review of the cases.[13] The first was *Herbert* v. *McQuade*,[14] the Clergy Sustentation Fund Case, and the second was *Blakiston* v. *Cooper*,[15] the Easter offerings case. I do not propose to read the passages which he read, but there is no doubt that reading those passages alone affords some support to the view of the Crown that the moment you find a payment is made to a man qua employee then automatically, apparently, it follows that it is a profit of his employment. But the reason, I venture to think, is one that I have already given, namely, that in those cases and, indeed, in the case next referred to in the judgment of Jenkins L.J., *Seymour* v. *Reed*,[16] there were only two possible alternatives: either it was a profit from the employment or it was a personal present.

In *Seymour* v. *Reed* Lord Cave said this: "These words and "the corresponding expressions contained in the earlier statutes "(which were not materially different) have been the subject of "judicial interpretation in cases which have been cited to your "Lordships; and it must now (I think) be taken as settled that "they include all payments made to the holder of an office or "employment as such, that is to say, by way of remuneration for

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[9] 16 T.C. 605.

[10] [1955] Ch. 284; [1955] 1 All E.R. 93; 36 T.C. 1.

[11] [1955] Ch. 284, 305.

[12] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281.

[13] [1957] 1 W.L.R. 674, 682.

[14] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

[15] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

[16] [1927] A.C. 554, 559; 43 T.L.R. 584; 11 T.C. 625.

" his services, even though such payments may be voluntary, but " they do not include a mere gift or present (such as a testimonial) " which is made to him on personal grounds and not by way of " payment for his services. The question to be answered is, " as Rowlatt J. put it: 'Is it in the end a personal gift or is it " 'remuneration?' If the latter, it is subject to the tax; if the " former, it is not."

Then Morris L.J. said this in *Bridges* v. *Hewitt*[17]: " In " my judgment the shares were not a profit from the office of " managing director because they were not received by way of " remuneration for services rendered as managing director. They " were received while Bearsley was managing director, but they " represented an expression of gratitude or a testimonial for what " he had done, including what he had done before ever he " became a director or managing director."

Now follows, I venture to think, what is an extremely important summary of the law, a little later on that page: " Accordingly, " the fact that someone who receives a benefit is the holder of " an office does not by itself prove that what he received was a " profit from the office. That has to be decided by considering " on the evidence whether what was received was received as " remuneration for the services rendered in the office." That, I respectfully believe, is the true test.

Then Sellers L.J. said this[18]: " In this way the transfer of " the shares is 'linked up' with the respective offices, but the " question is whether that necessarily or on a reasonable view " involves that the transfer was a payment of remuneration for " services rendered to the company or a profit of the employment. " I would not regard the transfer as having those attributes or of " such a character."

I now relate the law as I have endeavoured to state it to the facts. The housing agreement formed no part of the employee's remuneration, nor did any payment made thereunder. It formed no part of his contract of service, nor was it an inducement held out to him to enter into the company's employment, for he did not know of it until he had been employed for quite a long time. Of course, the housing agreement into which he entered—he need not, of course, if he did not want to—was an advantage to him, and so it was to his employers, for the reasons I have mentioned earlier. The matter must, as Jenkins L.J. said in *Moorhouse* v. *Dooland*,[19] be regarded from the point of view of the employee.

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[17] [1957] 1 W.L.R. 674, 698.

[18] Ibid. 701.

[19] [1955] Ch. 284, 305.

Save in the most general sense it does not seem to me accurate to say that to enter into the housing agreement or to receive a payment thereunder was a profit arising from his office. Of course, in a general sense, it was connected with his office; because if he had not been employed he would not have entered into it. It was offered to him, I entirely agree, in his character as an employee and not because of any characteristic personal to himself, and in that sense again it did accrue to him because he was employed. In another sense also it was connected with his employment in this way, that he entered into it because he knew that he might be transferred, and in that case he would be guaranteed against loss when he wanted to sell his house on transfer. But, as Lord Simon pointed out in *Beak* v. *Robson*,[20] those considerations are not really conclusive of the matter at all. You must find, looking at the true nature of the transaction, whether it was a profit arising from his office. In my judgment, as I have said, it was not. It was in no true sense a reward for his services. It was an advantage to him but not, in my judgment, a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers.

That is fatal to the Crown's claim, and I do not propose to examine the alternative claims advanced on behalf of Mayes upon the footing that the payment does arise from the office of employment, for the simple reason that in this very technical branch of the law it is too difficult and artificial to apply the law to a payment in respect of which I, at any rate, am prepared to deny the major premise as to its character. Accordingly, Mayes' case must be dismissed with costs.

JENNINGS v. KINDER (INSPECTOR OF TAXES).

I turn to Jennings' case. In that case, as I have said, the Crown succeeded. But it is admittedly indistinguishable except for the application of section 160 of the Income Tax Act, 1952. That arises in Jennings' case for this reason, that he was an employee in an altogether higher grade than Mayes, and he was at the relevant time receiving emoluments in excess of £2,000 a year. That is a condition necessary to bring section 160 into operation, and I shall now read it. Subsection (1): "Subject to the provi-"sions of this Chapter, any sum paid in respect of expenses by a "body corporate to any of its directors or to any person employed "by it in an employment to which this Chapter applies shall, if not

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[20] [1943] A.C. 352, 355.

"otherwise chargeable to income tax as income of that director "or employee, be treated for the purposes of paragraph 1 of the "Ninth Schedule to this Act as a perquisite of the office or "employment of that director or employee and included in "the emoluments thereof assessable to income tax accordingly: "Provided that nothing in this subsection shall prevent a claim "for a deduction being made under paragraph 7 of the said "Ninth Schedule in respect of any money expended wholly, "exclusively and necessarily in performing the duties of the office "or employment."

The whole question, therefore, is whether that applies to this sum of £450 paid to him by his employers. The chapter is headed "Expenses allowances to directors and others," and I approach this section with the view that "expenses" there is referring to the ordinary expenses that directors and employees incur and not to a payment such as this. That is not conclusive of the matter. First of all you have to find a sum paid in respect of expenses to an employee. £450 has been paid. But is it in respect of expenses? To what expense has the employee been put? That is plainly what the section contemplates. The answer is, in the year of assessment he has not been put to any expense at all. Unfortunately for him, he received rather less for the sale of a house than he had hoped, but he has not been put to any expense. He merely made a loss on the sale of his house, and that cannot in any ordinary use of language be described as an expense, I would have thought, for the purposes at all events of section 160. The only expense to which the employee was put was when he purchased the house some years before in another year of assessment, and all that has happened is that he has not received as much as he paid for it. It does not seem to me that that payment has the character of an expense for the purposes of section 160 at all. Accordingly, in Jennings' case I must allow the appeal, discharge the assessment, and the Crown must pay the appellant's costs.

Appeal dismissed in Mayes' case.
Appeal allowed in Jennings' case.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown. Both the cases raise the same point on appeal and can be argued together. It is well established that the taxable profits of an employment include every sum in money or money's worth paid by an employer to an employee in his capacity as employee, and without consideration moving from the employee other than the services which he renders. The matter must be considered from the point of view of the employee, the employer's motive being immaterial. The payment may be voluntary; it is not necessarily contractual. It may be a lump sum, and not necessarily concurrent. It may be a payment to an employee to relieve him in respect of an obligation to a third party, e.g., income tax.

Under the housing agreement no consideration is received by I.C.I. The employee is under no obligation to buy a house originally; his purchase of a house cannot be a consideration moving to I.C.I. Under the terms of the agreement the employee is entitled to substantial financial benefits and cannot suffer any financial detriment. If there had been no agreement at all, and the employers voluntarily recouped to the employee a loss on the sale of his house, that would plainly be a profit of the employee's office.

There is a long line of cases illustrating various aspects of the question. *Hartland* v. *Diggines*,[1] where the employers paid the employee's income tax, shows that the profits of an office include payment of an obligation to a third party. In *Weston* v. *Hearn*[2] a lump sum paid to an employee as a bonus for 25 years' service was held to be taxable. In *Ede* v. *Wilson*[3] employees were allowed to purchase shares at under market value under a promise not to realize them; the benefit conferred was held taxable. In *Nicoll* v. *Austin*[4] a managing director continued at the company's request to live in his own house, the company paying all outgoings; this was held to be a profit of his employment. *Edwards* v. *Roberts*[5] shows that when an employee is contingently entitled to a benefit, this is chargeable in the year in which it is received. In *Herbert* v. *McQuade*[6] a gift from a clergy sustentation fund, though wholly discretionary and payable by a third party, was held to be a profit of an incumbent's office. *Blakiston* v.

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[1] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247.

[2] [1943] 2 All E.R. 421; 25 T.C. 425.

[3] [1945] 1 All E.R. 367; 26 T.C. 381.

[4] (1935) 19 T.C. 531.

[5] (1935) 19 T.C. 618

[6] [1902] 2 K.B. 631: 18 T.L.R. 728; 4 T.C. 489.

Cooper,[7] the Easter offerings case, was similarly decided. *Seymour* v. *Reed*,[8] the cricketer's benefit match case, though decided in the taxpayer's favour, shows that voluntary payments made to a man by virtue of his office are taxable. Then there are four cases dealing with lump sums paid to directors of companies under varying circumstances: *Hunter* v. *Dewhurst*,[9] *Cameron* v. *Prendergast*,[10] *Beak* v. *Robson*[11] and *Tilley* v. *Wales*[12]; in cases where the taxpayer succeeded, it could not be said that the payment was made in respect of his office. There are also *Moorhouse* v. *Dooland*[13] and *Bridges* v. *Hewitt*,[14] which dealt with benefits conferred by third parties.

There is nothing in the cases which supports the principle arrived at in the court below that payments from an employer to an employee can be divided into two categories, those which are received as a reward for his services, and those which are received otherwise. This is an entirely novel distinction; if such categories exist, one must find what the characteristic distinction is; the test cannot be that the payment was voluntary, or that it was made to indemnify the employee against some loss, or that it was a lump sum. Here the agreement is wholly for the benefit of the employee, and is not collateral to his employment but made to obtain efficient and contented service, and so was directly concerned with his employment.

A consideration other than services moving from the employee can only be effective if it can be shown to be a full consideration in money or money's worth; a nominal consideration, such as would suffice to support a contract, will not suffice. Further, if some real consideration is shown, but only partial and insufficient to balance the consideration moving from the employer, there may be an apportionment between the taxable and non-taxable parts of the benefit received: see *Tilley* v. *Wales*.[15]

To escape liability, the taxpayer must establish that the loss falls within the scope of rule 7 of the Rules applicable to Schedule E, which has always been construed and applied strictly. To be deductible an expense must be incurred wholly, exclusively and necessarily in the course of the taxpayer's employment.

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[7] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

[8] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.

[9] (1935) 16 T.C. 605.

[10] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; 23 T.C. 122.

[11] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.

[12] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[13] [1955] Ch. 284; [1955] 1 All E.R. 93; 36 T.C. 1.

[14] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281.

[15] [1943] A.C. 346.

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Here the employee would have to show that for the performance of his duties it was necessary for him to buy and sell houses, and it is impossible to bring the facts of these cases within the rule. A loss made on the sale of a house is not within the rule, and any recoupment of such loss made by the employer falls to be taxed. [*Ricketts* v. *Colquhoun*[16] and *Bolam* v. *Barlow*[17] were referred to.]

Orr following. If the judgment below is to stand, it is difficult to see what can be the limits to tax-free benefits which employers may provide; they might, for instance, provide motor-cars or television sets on special terms. The option to purchase reserved by I.C.I. in the contract does not confer any financial benefit on the company, who cannot purchase a house at less than the fair value in the open market.

The agreement was in no way a collateral one; it was part of the general staff policy of I.C.I.

F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayers. The capacity in which an employee receives a benefit cannot be tested without examining whether the benefit was given for services or not; the fact that payment comes from the employer and is made under a contract merely poses the question without deciding it; in many of the cases already cited payments made by employers were held not to be taxable. The whole question is whether the payment is made in respect of services or not; all the cases make this clear.

The sum of £350 was paid to Mayes under the housing agreement for a consideration moving from him; the case stated finds that he was fully remunerated for his services by pay which was on a most favourable scale comparatively. The findings of fact in the case stated make it conclusive that the benefits under the housing agreement are not conferred for services; that agreement is wholly collateral and the employee could commit a breach of it without breaking his service agreement, and vice versa.

In *Inland Revenue Commissioners* v. *Duke of Westminster*[18] the taxpayer had contracted with a number of his servants to make payments to them while in his service, and sought to deduct them from his income for tax purposes; it was held that these payments were not for services and could be deducted for income tax purposes; aliter, if the payments had been for services. So, too, in the present cases non-taxable sums may be payable during the employment; the case also indicates that it is the contract under which the payment is made which must be looked to. Where payment is to be made under an independent contract to an employee, it is wrong to qualify the nature of his remuneration by the fact that he was an employee.

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[16] [1926] A.C. 1; 42 T.L.R. 66; 10 T.C. 118.

[17] (1949) 31 T.C. 136.

[18] [1936] A.C. 1; 51 T.L.R. 467; 19 T.C. 490.

We accept the Crown's main contention regarding the scope of Schedule E so long as it is emphasized that the payments are received by the employee in his capacity as employee. That depends on whether the payment is made in respect of services, the phrase habitually used in the cases in the House of Lords.

[JENKINS L.J. The question is: What is the consideration moving from the employee really on the true construction of the housing agreement?]

That is so, and here the taxpayer can show that his services are fully remunerated under the service agreement, leaving as independent the question whether there is any consideration under the housing agreement. The Crown argued that the court must weigh the adequacy of the consideration under the housing agreement, which is exactly what the House of Lords has refused to do. It is plain from the evidence and the terms of the agreement that I.C.I. have a most particular interest in acquiring the houses which fall vacant in cases where it suits them; they may often require them for accommodating an incoming employee. Their aim is to have an unworried and contented staff, and they obtain that by compensating an outgoing employee and accommodating an incomer. Then there are certain disadvantages from the employee's point of view; he may not let, though that might be advantageous to him; he may not take the opportunity of selling to a relative, or to some third party prepared to offer a higher than the ordinary market price; he must keep the house in repair. Moreover, he may, having knowledge of the scheme, have embarked his capital in buying a house which he would not otherwise have bought, and he may also have had to borrow in order to raise the money for the purchase. Then under certain circumstances an employee or his executors can sell the house without reference to I.C.I., in which case the indemnity does not operate. It must be that there is some substantial consideration moving to I.C.I., and, even if it is only partial and inadequate, the Crown agree that there should be an apportionment. [*Paterson Engineering Co. Ltd.* v. *Duff*[19] and *Tilley* v. *Wales*[20] were referred to.]

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[19] (1943) 25 T.C. 43.

[20] [1943] A.C. 386.

Even assuming that the consideration for the contract is the services of the employee, the compensation received should be regarded as a capital payment. The Crown must establish that the bargain amounts to this: that in consideration of you working for me I will in certain circumstances increase your remuneration. Here the contract can never produce a profit to the employee; it merely protects him against loss in certain events, and the recoupment of a loss cannot have the quality of income. In *Tilley* v. *Wales* [20] Lord Simon, and in *Hunter* v. *Dewhurst* [21] Lord Thankerton, were not prepared to agree that remuneration for services must necessarily be income, but in view of certain observations in those cases it might perhaps be better to make the distinction "income" and "non-income" rather than "income" and "capital." Schedule E does not cover capital gains, and section 511 (1) (*b*) of the Act of 1952 declares that capital losses are not to be deducted for income tax purposes.

Monroe following. The Crown claim that any payment made under the agreement must be in respect of services. It is not open to the Crown to put the onus on the taxpayer in that way; the question is whether a payment is part of the price of the employee's services, or a voluntary extra which falls outside, there being extraneous reasons for making the payment. One may liken the housing agreement to a millionaire playing a round of golf with his valet and having a bet on the result. Only married male staff may come into the agreement, and many may come in who never receive any payment at all. The agreement has reference to the employee's private living arrangements and has nothing to do with his services or any price which he receives for them.

Pennycuick Q.C. in reply. In no case can an employee suffer any substantial detriment under the housing agreement. Under the terms of his service agreement he has to go wherever he is sent within the United Kingdom, and the housing agreement imposes no hardship on him in this respect. In no case can he be financially worse off. The only disadvantage he can suffer is that in certain circumstances if he wants to sell his house (which he need not do) he must offer it to I.C.I. at full value before selling to a third party, a sentimental detriment which is irrelevant and trifling. That does not represent any, still less a full, return to the employer for the benefits conferred, and there must be substantial consideration, apart from services, if the sums paid are to escape taxation.

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[20] [1943] A.C. 386.

[21] 146 L.T. 510; 16 T.C. 605.

The payments are made to employees as such; no doubt in certain cases such payments may fall outside the scope of the profits of the employee's office, but that is not the case here. The payments were a regular feature of I.C.I.'s general staff policy; the recipients knew that and entered into the agreements accordingly. Further, it is against all principle and authority to maintain that a contractual payment made to an employee without consideration is not a profit of his office merely because another contract provides for full remuneration for his services.

Cur. adv. vult.

July 7. The following judgments were read.

JENKINS L.J. I have felt considerable difficulty over these two cases, but with some hesitation I have come to the conclusion that the appeals should be dismissed.

I need not repeat the facts at length. The housing scheme established by I.C.I. was designed to assist married male members of the staff of I.C.I. to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another in the course of their employment by I.C.I. The assistance provided consisted, in effect, of a contribution by I.C.I. towards the cost of the house in the form of an interest-free loan, and a guarantee by I.C.I. indemnifying the employee concerned against loss through depreciation in the value of the house. No question arises in regard to the interest-free loan. As regards the guarantee, admission to the scheme was to be afforded by means of a standard form of housing agreement to be entered into between I.C.I. and the employee concerned, setting out in considerable detail the terms on which and circumstances in which the guarantee was to operate.

The respondent employees in these two appeals both bought houses on being transferred to new places of work and, pursuant to the scheme, both duly entered into housing agreements with I.C.I. Both were later again transferred and sold their houses in consequence. The house in each case realized less on such sale than the employee had paid for it, and under their guarantee I.C.I. paid or allowed in account to the employee the appropriate sum in respect of such loss.

The sole question in each of the two appeals is whether the sum so paid or allowed by I.C.I. to the respondent employee was a profit of his employment and, accordingly, chargeable to income tax under Schedule E. The charge to tax under this Schedule is now contained in section 156 of the Act of 1952, and paragraph 2 of the Schedule as therein set out provides: "Tax under this "Schedule shall also be charged in respect of any office, employ"ment or pension the profits or gains arising or accruing from "which would be chargeable to tax under Schedule D but for the "proviso to paragraph 1 of that Schedule." Paragraph 5 applies the provisions of the Ninth Schedule to the Act. Rule 1 of that Schedule is in these terms: "Tax under Schedule E shall be "annually charged on every person having or exercising an office "or employment of profit mentioned in Schedule E, or to whom "any annuity, pension or stipend chargeable under that Schedule "is payable, in respect of all salaries, fees, wages, perquisites "or profits whatsoever therefrom for the year of assessment, after "deducting the amount of duties or other sums payable or charge"able on the same by virtue of any Act of Parliament, where the "same have been really and bona fide paid and borne by the party "to be charged."

The objects with which I.C.I. established the housing scheme are thus described in the case stated with respect to Mayes:

"3 (*g*). I.C.I. have to move a great number of their staff from "one part of the country to another. The company recognizes "that the transfer of a married man involves him in domestic "upheaval.

"Although a man might be willing to buy a house in the "new location, his chief worry was the loss he might make if he "had to sell the house. I.C.I. try to operate a staff policy "which results in a contented staff. Unless the staff are con"tented they do not do their best work. I.C.I. therefore "introduced the housing scheme so that they should have "employees whose minds were eased to some extent of the worry "of possible financial embarrassment in the future arising out of "the removal occasioned by the company's action."

The case stated with respect to Jennings contains in paragraph 5 a description of I.C.I.'s objects which, though couched in different language, is substantially to the same effect.

The housing agreements entered into by I.C.I. with Mayes and Jennings respectively are attached to the two cases and I need not recite them in full. They are in the standard form used by

I.C.I. for the purposes of their housing scheme, and their salient features for the purposes of the two appeals may be thus summarized: [His Lordship summarized the terms as set out above, and continued:] Such being the nature of the housing agreement, were the payments made by I.C.I. to Mayes and Jennings respectively pursuant to the guarantee upon their respectively being transferred and selling their houses for less than they had paid for them, after first duly offering them to I.C.I., profits of their employment with I.C.I.? We were referred to many of the authorities in which payments received by holders of offices or employments in an infinite variety of circumstances have been held to be or not to be profits of the office or employment for tax purposes. I do not propose to go into them at length. The general principles to be applied are well settled. The difficulty is to apply them to the facts of particular cases.

I am content to accept Mr. Pennycuick's broad proposition that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee, and for no consideration moving from the employee other than the services which he renders. I would, however, qualify that broad proposition by saying that is not to be taken as extending to "testimonials" of the kind considered by the House of Lords in *Seymour* v. *Reed*,[1] and also that there may be benefits casually bestowed by an employer on an employee such as birthday, Christmas, or wedding presents, or given on compassionate grounds referable to relationships, friendship, social custom, or motives of charity which, though made for no consideration in the legal sense, should not be treated as referable to services or as made to the employee in that capacity. But no exception of that kind arises here.

I am also content to accept the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment albeit made during the continuance of the employment.

The decisive question in each of these two cases, therefore, is, as I see it, simply whether the payment made by I.C.I. to the employee pursuant to the guarantee is a payment made to the employee in that capacity and for no consideration other than services, in which case it is taxable as a profit of his employment,

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[1] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.

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or was such payment made for a consideration other than services, in which case it is not so taxable.

I think it may truly be said that the housing agreement in each case was entered into by I.C.I. with the employee in his capacity as employee, in the sense that it was by virtue of his being an employee of I.C.I. that he was given the opportunity of participating in the housing scheme, and for that purpose of entering into the housing agreement with I.C.I. But it does not necessarily follow that the employee, having entered into the housing agreement and, thereafter, receiving a payment from I.C.I. under the guarantee, must be taken to have received that sum in his capacity as employee, and for no consideration other than services. The employee was enabled to enter into the housing agreement by virtue of the fact that he was an employee of I.C.I. But any payment he might receive under the housing agreement would be received by him because, being an employee of I.C.I., he had entered into the housing agreement and had complied with all its terms and conditions.

In order to participate in the housing scheme an employee of I.C.I., over and above answering that description, and being married, had to comply with a number of conditions. In order to bring himself within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house, and find the purchase money for it, either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by I.C.I. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose. But any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid upon him to offer the house for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event, and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance.

The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to I.C.I. Then it is to be observed that the agreement makes it a condition precedent to any claim under the guarantee that the employee should keep the house in good tenantable repair. It is, of course, true that on spending money on repairs the employee would be maintaining the value of his own property. Nevertheless, this stipulation does impose as a condition of benefit an obligation not incumbent upon a freeholder in the ordinary way. Then the provisions as to the termination of the housing agreement include, as bringing about such termination, the events of the employee letting the house or any part thereof, or ceasing to use the house as a permanent residence. It appears to me that the condition against letting (and particularly against letting "any part" of the premises) might operate substantially to the detriment of the employee, as also might the condition against ceasing to use the house as a permanent residence (whatever the precise meaning of that expression may be). Then, in the event of the employee desiring to sell otherwise than on transfer or retirement (in which event, as in the case of a sale by the personal representatives of a deceased employee, the house is not apparently required to be offered for sale to I.C.I.) no claim can be made under the indemnity unless I.C.I. consents to the house being sold and the house is first offered for sale to I.C.I.

The rights of the first refusal given to I.C.I., particularly the positive obligation the employee is under to offer the house for sale to I.C.I. where an employee desires to sell or let on transfer, might well be advantageous to I.C.I., notwithstanding their obligation under the guarantee, in the event of there being a shortage of suitable accommodation for their employees. One may take it, too, that I.C.I. regard it as expedient from a business point of view that employees should be encouraged to buy houses on the terms of the housing scheme and agreement, thus helping to ease the problem of staff housing.

The matter is put by Mr. Pennycuick as one of pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than services. I cannot share this view. The balance of burden and benefit under the housing agreement must be regarded as at the date when it is entered into with any given employee. When it is entered into no one can tell whether the house will rise or fall in value. If it rises in value, the

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employee gets no benefit apart from peace of mind. On the other hand, in order to be covered against a possibility of loss which has never materialized, the employee will, it may well be to his detriment, have done or abstained from doing the things which under the housing agreement he is required to do, or abstain from doing it as a condition of benefit. I.C.I., on its part at least, gets the advantage of the right of pre-emption in the event of the employee desiring to sell or let on transfer, which in the circumstance I postulate would entitle I.C.I. to buy simply at the current market value without any addition thereto for depreciation in value, since there would have been none. In the event of the house depreciating in value the employee does, no doubt, gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than his services.

The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss. To segregate the benefit (in cases in which it is material) from the burden, and to ignore the cost to the employee of obtaining it, in the shape of the purchase money he has laid out on the faith of the housing scheme and agreement, and lost through the depreciation in value of the house, ignoring also the other forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by I.C.I. under the indemnity by way of recoupment for that loss is a profit of his employment, as being a sum received for no consideration other than services, appears to me to involve a considerable distortion of the facts.

Mr. Pennycuick says (in effect) that this result must ensue because (a) the payment made by I.C.I. under the guarantee is a profit of the employee's employment taxable under Schedule E; (b) under rule 7 of the Rules applicable to Schedule E the employee cannot deduct any expenses not wholly, exclusively and necessarily incurred in the course of his employment; and (c) the expenditure incurred in the purchase of the house does not answer that description, inasmuch as the employee need not have purchased the house. Mr. Pennycuick says further, that if the employee could deduct the amount of his loss on the house (as in fact he could not) tax would be exigible on the corresponding amount paid to him by I.C.I. under the guarantee.

I find it difficult to rid myself of the inclination to think that if the house-purchase transaction is looked at as a whole no profit arises from it to the employee, even in a case in which the guarantee becomes operative. If that were right, then there would be an end of the matter. If it is wrong, and any sum paid under the guarantee is to be taken in isolation and looked on as profit, then the question remains whether it was paid by I.C.I. to the employee for no consideration other than services. If it is to be so looked on and was so paid, then I agree with Mr. Pennycuick that no deduction in respect of the employee's outlay on the house would be allowable.

The whole case in a simplified form can be put thus. Suppose an employer makes a bargain with his employee to the effect that if the employee buys a house in a given locality, keeps it in repair, refrains from letting it, uses it as a personal residence and undertakes to give the employer the first refusal of it in the event of his desiring to sell, the employer on his part will guarantee the receipt by the employee on any resale by him, whether to the employer or to some other purchaser, of a price equal to the current market value of the house, or the amount he paid for it, whichever is the greater. Suppose, further, that the employee does buy a house and duly complies with all the employer's requirements, and at some time thereafter, the stipulated offer to the employer having been made and refused, the employee sells the house to someone else at less than the price he paid, and the employer duly makes good the difference to the employee. In those circumstances, is the difference so made good to the employee, if a profit at all, a profit of his employment, as having been received by the employee in that capacity and for no consideration other than services?

Mr. Pennycuick pointed out that the discharge by an employer of a liability incurred by his employee to a third party may, to the extent of the liability thus discharged, constitute a profit of the employee's employment. In support of that proposition, which I fully accept, he cited *Hartland* v. *Diggines*,[2] where an employer paid his employee's income tax, and this was held to constitute a profit of his employment. He also cited on the same point *Nicoll* v. *Austin*,[3] where a managing director continued at the company's request to live in his own house, the company paying all outgoings, and these payments were held to be profits of his office.

For the proposition that a single payment to an employee may be a profit of the employment (which, again, I fully accept) he

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[2] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247.

[3] (1935) 19 T.C. 531.

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cited *Weston* v. *Hearn*,[4] where a lump sum paid to an employee on completing 25 years' service was held taxable.

For the proposition that a benefit contingently receivable by an employee as a profit of his office or employment is to be treated for tax purposes as income of the year in which it is received, Mr. Pennycuick cited *Edwards* v. *Roberts*.[5] I think that must be so where no money value can be put on the benefit until it is actually realized. So here, if the payment under the guarantee is rightly to be treated as a profit of the employee's employment, it would seem that it must be treated as accruing on the date on which it became payable, inasmuch as it could not be quantified until the contingency of capital loss materialized.

On the main issue of the case, Mr. Pennycuick referred us to the line of cases headed by *Hunter* v. *Dewhurst*,[6] in which payments made by companies to directors have been considered. These cases, no doubt, bear out the broad general proposition attributed to Mr. Pennycuick earlier in this judgment, but they equally bear out the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employee's employment. For example, in *Hunter* v. *Dewhurst* itself Lord Atkin said [7]: " Rule 1 " (sc. of the Rules applicable to Schedule E) " appears " to me to indicate emoluments either received from the employer " or from some third party . . . as a reward for services rendered " in the course of the employment." Again, in *Beak* v. *Robson*, Lord Simon said [8]: " In the agreement before us the obligations " flowing from the contract of service and the remuneration to be " received by the respondent in respect of that service are entirely " separate from the restrictive covenant and the consideration " which is given for it. The sum of £7,000 is not paid for any" thing done in performing the services in respect of which he is " chargeable under Schedule E."

We were also referred to the line of cases dealing with payments by third parties, headed by *Herbert* v. *McQuade*,[9] of which the latest examples are *Moorhouse* v. *Dooland* [10] and *Bridges* v. *Hewitt*.[11] This line of authority, besides affording ample recognition of the principle that to be taxable under Schedule E payments made to the holder of an office or employment must be by way of remuneration for his services (see, in particular, Lord Cave L.C. in *Seymour* v. *Reed*,[12] a passage too well known to bear repetition), clearly established the proposition that the question whether a given payment is a profit of his office or employment must be viewed from the standpoint of the recipient. This proposition has its origin in the well-known passage from the judgment of Sir Richard Henn Collins M.R. in *Herbert* v. *McQuade*[13]: " . . . the test is whether, from the standpoint of "the person who receives it, it accrues to him in virtue of his "office . . . " The following passage from the judgment of Stirling L.J. in *Herbert* v. *McQuade* seems to me to be much in point: "A profit accrues by reason of an office when it comes to "the holder of the office as such and without the fulfilment of "any further or other condition on his part."

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[4] [1943] 2 All E.R. 421; 25 T.C. 425.

[5] (1935) 19 T.C. 618.

[6] (1932) 16 T.C. 605.

[7] Ibid. 645.

[8] [1943] A.C. 352, 355; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.

[9] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

[10] [1955] Ch. 284; [1955] 1 All E.R. 93; 36 T.C. 1.

[11] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281.

I do not see how the payments made by I.C.I. to the taxpayers in the present appeals can be held to have satisfied either of these tests. As to the latter, the employee here did have to fulfil further or other conditions. As to the former, I cannot conceive that either of the two respondents regarding the matter from their own point of view as recipients of the payments, could possibly have looked upon them as profits of their employment or, in other words, as remuneration accruing to them by reason of their employment by I.C.I. as distinct from payments which, in the events which happened, they received from I.C.I. under and by virtue of the housing agreement.

I derive assistance, too, from the following passages in *Beak* v. *Robson* and *Cowan* v. *Seymour*. In *Beak* v. *Robson* Lord Simon said[14]: "It is quite true that, if he had not entered into "the agreement to serve as a director and manager, he would not "have received £7,000, but that is not the same thing as saying "that the £7,000 is profit from his office of director so as to "attract tax under Schedule E." In *Cowan* v. *Seymour*, Younger L.J. said[15]: " . . . their office or offices as such . . . may "have been the causa sine qua non but they were not the causa "causans." I think it may well be said here that while the employee's employment by I.C.I. was a causa sine qua non of his entering into the housing agreement and, consequently, in the events which happened, receiving a payment from I.C.I., the causa causans was the distinct contractual relationship subsisting between I.C.I. and the employee under the housing agreement, coupled, of course, with the event of the declining in value.

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[12] [1927] A.C. 554, 559.

[13] [1902] 2 K.B. 631, 649, 650.

[14] [1943] A.C. 352, 355.

[15] [1920] 1 K.B. 500, 517.

Mr. Pennycuick said (in effect) that a consideration other than services could only be shown if the consideration (other than services) moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in fact remuneration as payable on some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain advantageous, no doubt, to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals.

Mr. Pennycuick said further, that if partial consideration in money or money's worth was shown, there should be an apportionment, and he instances *Tilley* v. *Wales*.[16] But in that case it was possible to apportion the sum received so as to ascertain how much of it was attributable to the director's agreement to a reduction of salary (which was taxable), and how much to commutation of pension (which was not). In the present case obviously there could be no apportionment. It must be all or nothing.

For the reasons I have endeavoured to state, I do not think the sums received by the two respondents under their respective housing agreements were profits of their employment so as to be taxable under Schedule E, and, accordingly, in my view, both appeals (which it is now agreed must stand or fall together) should be dismissed.

PARKER L.J. This is not an easy case and it is with considerable diffidence that I have come to a different conclusion.

I do not think that any useful purpose would be served by going through the authorities. Most of them are conveniently collected in the judge's judgment in the present case, and in the recent decision of this court in *Bridges* v. *Hewitt*.[17] Though there appeared at one time to be an issue between the parties as to the true principle of law involved, I am satisfied that there is no real difference. The principle can, I think, be stated thus.

Where you find that an employee has during the course of his employment received from his employer a benefit in money or money's worth, that receipt is a profit of his employment and taxable as such unless (1) it amounts to a gift to him in his personal capacity, e.g., a benefit conferred out of affection or pity; or (2) it has been received for a consideration other than the giving of services. This can be put more shortly by saying that such a benefit, to be a profit of his employment, must have been received by him in his capacity of employee as a reward for services. In the two exceptions referred to above, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services.

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[16] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[17] [1957] 1 W.L.R. 674.

The real difficulty is as usual in the application of that principle to the facts of the case. I will deal first with what I have referred to as the first exception. It was argued—albeit faintly—that the indemnity when received whether in money or in account was in truth a mere compassionate allowance. It is enough to say that in my judgment that is an impossible argument on the facts found in these cases. The housing scheme formed part of the I.C.I.'s staff policy and the housing agreement was one open to any of a class of employees who wished to avail themselves of it.

Whether, however, this can be said to be within the second exception is more difficult, and depends on a proper construction of the housing agreement. On behalf of the Crown it is contended that looked at broadly this agreement is wholly for the benefit of the employee, and that the real or substantial consideration is services. For the respondent, on the other hand, it is said that on a proper analysis the housing agreement itself sets out a substantial consideration and that it would be wrong to look outside the contractual terms in that agreement, cf. *Inland Revenue Commissioners* v. *Duke of Westminster.*[18] The housing agreement accordingly, it is said, is purely collateral to the service agreement.

Now I take it to be the law that it is not enough to make an agreement collateral in this sense that there is sufficient consideration to support it. Otherwise an agreement to make a purely voluntary payment for services, e.g., in recognition of 25 years' service, would, if under seal, come within the exception. Nor do I think that it is enough to make the agreement collateral that some term is inserted which may be said to be of some advantage to the employer or cause some detriment to the employee.

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[18] [1936] A.C. 1; 51 T.L.R. 467; 19 T.C. 490.

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Thus agreements with employees living 20 miles from their place of work, that employers would repay half the price of their season tickets, could not be said to be collateral merely because the employees would have to buy season tickets as a condition of getting repayment. The question, I think, in every case is one of degree depending upon whether the term can properly, in the surrounding circumstances when the agreement was made, be said to be merely a term of the receipt of additional benefit for the employee's services or can properly be said to amount in itself to the substantial consideration for the benefit, in which case the consideration is other than for services. In approaching the matter in this way I am not conscious of taking a line in conflict with the *Duke of Westminster* case.[19] I am merely construing the agreement in question in the light of the surrounding circumstances.

Now while the housing scheme is not altogether easy to construe I think that the following can be clearly deduced from it. (1) It is no part of the consideration that the employee agrees to be transferred. He has by his service agreement bound himself to go where he is sent and it is for him to get such living accommodation as he can at his new place of work. (2) If he desires to sell the house he will be entitled to any profit that is realized and he will be indemnified against any loss. (3) In certain events he has to give his employers a first refusal to buy the house but if they do so he is to get the current market value. In assessing this any offers from prospective purchasers would no doubt have to be taken into consideration. Accordingly the employee can in no event suffer a pecuniary loss and he gives up nothing of pecuniary value. He is merely in certain cases restricted in his choice of purchasers. (4) Apart from having to give a first refusal in certain events the only possible detriment he could be said to suffer was that he had to keep the property in good tenantable repair, and that on transfer he is not allowed to let it. (5) While there is no express finding to this effect it is, I think, fair to assume that from time to time, though not in these cases, the first refusal will turn out to be of benefit to the employers in that it may enable them to offer the house to another employee. On the other hand it is clear, and there is an express finding to this effect, that the real object of the agreement is to make the employee contented and free from financial worry, an object which of course benefits both employee and employer. Bearing these considerations in mind I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services. It would be quite unrealistic to say that the consideration for the indemnity is the giving in certain events of a first refusal or the obligation to keep in repair. Not only is the object of the agreement to improve the services which the employee is giving, but in my judgment the indemnity is given in consideration of those services just as if the service agreement had itself provided that the remuneration was to include the benefits under any housing agreement. To look at the matter from another angle, if such an agreement had been entered into by I.C.I. with a stranger, it could only be regarded as an instrument of bounty.

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[19] [1936] A.C. 1.

Great reliance, however, was placed by the respondents on the express finding that the salaries payable under the service agreement compared favourably with those paid by other employers not operating a housing scheme. This, it was said, if not conclusive, was at any rate prima facie evidence that the consideration under the housing agreement was for something other than services. For my part I find it impossible to attach any weight to this finding or argument. The salary which an employer is able to pay and pays depends on so many factors. One employer may find himself in a position to pay and will pay more than another, and the fact that a good employer is already paying what is found to be a full and adequate salary goes in my judgment nowhere towards showing that some other benefit he is prepared to give is not in consideration of services.

Finally, it was contended on behalf of the respondents that even if the sums were received as a reward for services they were not the profits of employment. The agreement it was said only protects the employee against loss—it does not and cannot produce profit—and accordingly the sums received have none of the attributes of income. I confess that I cannot understand this argument. If sums received pursuant to an undertaking to pay obligations incurred to third parties are taxable, cf. *Hartland* v. *Diggines*[20] and *Nicoll* v. *Austin*,[21] I can see no reason why the present sums received pursuant to an agreement by way of indemnity are not equally taxable.

Accordingly I would allow these appeals.

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[20] [1926] A.C. 289.

[21] 19 T.C. 531.

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PEARCE L.J. In these cases the difficulties come, not from any difference in opinion as to what are the principles applicable to them, but from a difference as to how these principles should be applied to the facts. The cases turn on the view that one takes of the housing agreement.

The benefit under consideration is taxable as a profit of the employment only if it has been received by the employee in his capacity of an employee as a reward for services and not for some consideration other than the giving of services. Stirling L.J. said in the well-known passage in *Herbert* v. *McQuade* [22]: "A "profit accrues by reason of an office when it comes to the holder "of the office as such, in that capacity and without the fulfilment "of any further or other condition on his part."

I fully accept that the "other condition on his part," the consideration moving from the employee, must be more than a technical consideration. It must not be a mere cloak to conceal any additional benefit given to the employee as such. It must in my view be such as to entitle both the consideration and the benefit obtained thereby to rank as a collateral transaction. The alleged collateral transaction need not be weighed in exact scales in order to see who benefits most by it. Such a task would be hard when on the one side you get a human who may be preoccupied with the price of a house and security against the risk of losing a comparatively small sum and on the other side a limited company with millions at its disposal concerned to see that the human frictions do not clog the machinery of its vast enterprises.

If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thereby making him a more contented worker), and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. When a man gives a consideration that costs him little but is important to a rich recipient he may fairly receive for it a price that is handsome in some contingencies. Perhaps a convenient test might be this: Is this a scheme that could commend itself on its merits to a director who thinks that the company's employees are already adequately paid and does not intend to do anything for the mere purpose of giving them additional financial benefits?

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[22] [1902] 2 K.B. 631, 650.

The Crown contends that under the housing agreement the employee gets the reimbursement of loss on his home for no real consideration other than his services as an employee. If this is the true view, the sum in question is taxable.

One cannot shut one's eyes to the fact that every large company owning factories in different places and having to transfer staff from one to another for purposes of promotion, organization or otherwise, is bound to have a serious concern for the housing of employees so transferred—a concern which could at times become acute. Is this housing agreement seriously intended to help with that housing problem as it affects the company? Or is it merely intended to help the individual employee financially? Or is it a genuine attempt to fulfil both these intentions on a fair and mutual basis?

Under the scheme the employee is reimbursed in respect of loss but he does not make a profit in the normal sense. The first matter dealt with in the agreement is the moment when an employee is transferred. Under clause 2 if an employee who has bought a house on the terms of the agreement is transferred and wishes to sell or let (one of which in the ordinary case he will do) the company shall have a 30-day option on the house to buy it at a valuation. That clause is definite in its terms and there is no relaxation of it as there is in respect of a clause dealing with other situations. Is it unfair to draw the inference from the agreement that this option is of importance to the company? That inference accords with what one might expect as a matter of common sense. At the moment of transfer the company is concerned with the housing of a successor to the man transferred. Secure in the possession of an option, it can appoint a successor having (and imparting to him) the knowledge that a house is available at a valuation which the company can either buy (if need be) or guide into the successor's possession under its option. Moreover, the option prevents the outgoing employee from being tempted to ask a fancy price from his successor. As other clauses provide for reimbursement of the owner for any loss, the agreement obviates the natural resentment that the owner would feel if compelled to sell to a rich company at what turns out to be a loss.

The employee is thus prevented from selling or letting his house on transfer before the company has had a 30-day option to buy it. It is true that if he wishes to keep on his house without selling or letting he may do so, e.g., if he leaves his family behind him. But this seems a reasonable concession, and I see no reason to suppose that in practice it would frequently arise or be used for any deliberate evasion of giving the option.

Clause 3 deals with the situation if the option is refused or the employee retires on pension or dies. Presumably it is because of not unreasonable social considerations that there is no provision by which the company can turn out a widow or pensioner. Many men would not enter schemes under which their widows could be evicted on their deaths or they themselves could be evicted on retirement. If any of the three events happen and within 12 months the house is sold at a loss, the company makes good the loss. If it is not sold within 12 months and a valuation shows it to be worth less than it cost the employee (plus improvements) the difference is paid by the company to the employee or his representatives.

Clause 4 deals with the situation where an employee before a transfer wishes to sell. If he wishes for reimbursement of loss he must obtain the company's consent and give the company a 30-day option to buy it at valuation. Clause 7 makes it clear that in respect of clause 4 (i.e., the time before transfer) the owner is always free to sell at a profit. The fact that clause 7 gives him no such freedom under clause 2 in respect of the moment of transfer would seem deliberate. The period when a man is still working where his house is, and he has not been transferred, could hardly create any housing problem. If a man sells his home in a place where he is still employed, he presumably does so because he knows that he can rehouse himself. At all events, he cannot thereafter blame the company if he is then homeless. In such a situation the company is only required to reimburse any loss if it has given its consent and gets an option on the house. It must be remembered that by reason of the fact of the agreement the company is probably in touch with the situation regarding the particular house, and is quite entitled to make any offers for it. Under clause 6 the employee has to keep the house in good and tenantable repair as a condition precedent to any reimbursement of loss.

In my view, the company gets a definite benefit from the scheme in its general problem of housing staff, as well as in its particular solicitude for the welfare of the individual employee, since it entitles it as a rule to a house for his successor. The employee does various things which are a real consideration. He

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has to find a house within reach of the factory, and embark on the venture of buying it, probably entering a first mortgage and probably producing some money of his own. He must keep the house in good condition. Before he can get any reimbursement he must suffer loss on resale or loss by diminution of value. In many cases this will never arise; but in any event he has to give the company an option to buy it at a valuation on transfer, and thereby loses his opportunity of asking possibly an enhanced or fancy purchase price or rent from his successor, who might (if unsure of any housing on transfer) be prepared to pay it.

Any assumptions that I have made are, I think, natural inferences that should be drawn from the agreement, and are confirmed by the important surrounding circumstance that it is an agreement with a member of the staff made by a large company which has to transfer its employees to various parts of the country. Paragraph 3 (g) of the case stated with regard to Mayes is not, I think, inconsistent with these inferences. That reads: "I.C.I. have to move a great number of their staff from one part "of the country to another. The company recognizes that the "transfer of a married man involves him in domestic upheaval. "Although a man might be willing to buy a house in the new "location, his chief worry was the loss he might make if he had "to sell the house. I.C.I. try to operate a staff policy which "results in a contented staff. Unless the staff are contented they "do not do their best work. I.C.I., therefore, introduced the "housing scheme so that they should have employees whose "minds were eased to some extent of the worry of possible "financial embarrassment in the future arising out of the removal "occasioned by the company's action." The words "might be "willing to buy a house" seem to indicate that the company, as one would suppose, wishes to promote the owning of homes by its employees (no doubt for the company's ultimate benefit), and to remove the formidable deterrents that buying and owning a possibly transient home present to the man without capital resources.

It is true that overall the employee gets an advantage in many cases, but I think that this is a careful scheme with some gains and concessions on both sides. It is designed on terms very generous to the employee in certain events but not, in my view, to an extent that robs it of real mutuality.

The employment was a causa sine qua non of the benefit, but it was not the causa causans. Here there was no one causa causans. The benefit was produced by the joint effect of the

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employment, the finding and purchase of the house, the making of the housing agreement, the transfer of the employee and the loss of value in the house whereby the benefit became payable under the terms of that agreement.

I agree with the view expressed by the judge when he says [23]: "It was in no true sense a reward for his services. It was an "advantage to him but not, in my judgment, a profit. It was "something which was wholly collateral and really had nothing to "do with the office or the services which he was bound to render "to his employers."

I would dismiss these appeals.

Appeals dismissed.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale.*

F. R. D.

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[23] Ante 38.

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June 3, 4;
July 2.

Lord Evershed M.R.,
Romer and
Ormerod L.JJ.

In re GILLINGHAM BUS DISASTER FUND. BOWMAN AND OTHERS *v.* OFFICIAL SOLICITOR AND OTHERS.

[1956 G. No. 1308.]

Charity—Imperfect trust provision—Memorial fund—Marine cadets killed in road accident—Trusts for paying funeral expenses, care of disabled and "other worthy causes"—Void for uncertainty—Whether validated by Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58).

On December 13, 1951, following a road accident in which a number of Royal Marine cadets were killed and injured, a letter in the following terms was written to and published in a daily newspaper on behalf of the plaintiffs, the then mayors of the surrounding towns: ". . . the mayors . . . have decided to promote "a Royal Marine Cadet Corps Memorial Fund to be devoted, among "other things, to defraying the funeral expenses, caring for the "boys who may be disabled, and then to such worthy cause or causes "in memory of the boys who lost their lives as the mayors may "determine."

In response to the appeal the public contributed nearly £9,000, partly in large sums from known persons but mainly anonymously as a result of street collections, football matches, whist drives, and so forth. The plaintiffs, as trustees, having spent some £2,368 in defraying funeral expenses and caring for the disabled, now sought to determine whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954,[1] or otherwise; and whether the surplus was applicable cy-près for charitable purposes, or was repayable to the donors on a resulting trust.

On appeal from Harman J., who decided that the trusts were void for uncertainty and that the Act of 1954 did not apply to validate them:—

Held (Ormerod L.J. dissenting), (1) that to come within the scope of the Charitable Trusts (Validation) Act, 1954, it had to be shown first, that there was an imperfect trust provision contained in an instrument within section 1 of the Act and, secondly, that there had been a "disposition" of property within section 2 (1) to be held or applied for the objects of that imperfect trust provision and no others.

(2) That it could not be said that the donors in making contributions in response to the appeal had "created" in these gifts a separate and distinct interest in favour of the "worthy cause or causes" to be selected by the mayors, and, accordingly, that section 2 (3) did not apply, and there was therefore no "disposition" of property in relation to which the alleged imperfect trust provision could take effect.

Semble that the creation of a distinct interest would not be negatived by the mere circumstance that the extent of that interest

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[1] Charitable Trusts (Validation) Act, 1954, s. 1: "(1) In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

"(2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before December 16, 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—

"(*a*) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and

"(*b*) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorize use for charitable purposes. . . .

"(3) A document inviting gifts of property to be held or applied for objects declared by the document shall be treated for the purposes of this section as an instrument taking effect when it is first issued. . . ."

S. 2: "(1) Subject to the next following subsection, this Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision, and to any covenant to make such a disposition, where apart from this Act the disposition or covenant is invalid under the law of England and Wales, but would be valid if the objects were exclusively charitable. . . .

"(3) A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created."

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is not quantified and might not at the relevant time be capable of quantification.

Per Ormerod L.J. The contribution to the fund on the understanding that it would be dealt with on the terms of the letter constitutes a disposition of property creating interests in those terms, the actual "creating" being done in each case by the contributor. If there was a right to ensure that, after satisfying specified objects, the residue of a fund should be applied for other purposes, that was an "interest," even though it might be contingent on the existence of a fund for disposal.

Decision of Harman J. [1958] Ch. 300; [1958] 1 All E.R. 37 affirmed.

Appeal from Harman J.

In December, 1951, following a road accident in which 24 Royal Marine cadets were killed and several more injured, the mayors of Gillingham, Rochester and Chatham decided to promote a fund in memory of the boys and to make an appeal to the public for funds for that purpose. Accordingly, the town clerk of Gillingham wrote to the editor of the "Daily Telegraph" this letter, which was published on December 13, 1951: "Sir, "the mayors of Gillingham, Rochester and Chatham have "decided to promote a Royal Marine Cadet Corps Memorial "Fund to be devoted among other things to defraying the "funeral expenses, caring for the boys who may be disabled, "and then to such worthy cause or causes in memory of the "boys who lost their lives as the mayors may determine. This "tragedy has been a shock to the whole country, and in view "of the widespread messages of sympathy which have been "received, their worships feel sure that many persons would "wish to be associated with the fund, and that all concerned "would wish it to be really worthy of its objects."

About £9,000 was contributed to the fund, but compensation was fully provided by the acceptance by the proprietors of the bus which did the damage of common law liability for negligence. In the event the three mayors found themselves with an unexpended balance of over £7,000, having exhausted all the purposes available to them according to the terms of the letter, except "such "worthy cause or causes in memory of the boys who lost their "lives, as the mayors may determine."

Accordingly, they, as trustees of the fund, took out a summons asking the court to determine (1) whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954,[1] or otherwise; and (2) whether the surplus of the fund was applicable cy-près for some charitable purpose, or was repayable to the donors who had contributed to the fund, in the proportions of their gifts, or went to the Crown as bona vacantia.

Harman J. declared that the Act of 1954 did not apply to validate the trust, and it was void for uncertainty; that, accordingly, there could be no application cy-près, and that as the claim of the Crown to the fund as bona vacantia failed, the fund was held on a resulting trust for the donors, and he directed an inquiry as to their identity.

The Attorney-General, who claimed the surplus for charity, appealed. For the purposes of the appeal the letter was taken as a sufficient statement of the terms and purposes on and for which all the moneys would be held and applied. The Crown's claim to bona vacantia was not pursued and the Treasury Solicitor did not appear and was not represented.

Denys Buckley for the Attorney-General. For the purposes of the Charitable Trusts (Validation) Act, 1954, a distinction must be drawn between the imperfect trust provision, the instrument in which it is contained and the disposition to which the Act applies. The imperfect trust provision is abstract; it is something which the instrument says or does. In a will, for example, the imperfect trust provision might be a declaration of trust contained in the will, that is, the instrument. It has to be expressed in an instrument. The will itself would be the disposition. If, however, the gift by will was to a pre-existing charity, the will would be the disposition but the imperfect trust provision and the instrument containing it would be found in the constitution of the charity. The instrument in the present case is the letter to the newspaper inviting subscriptions which are to be held on the imperfect trusts. The dispositions are the contributions made by the contributors. If the Act applies, the trust would be treated as from the commencement of the Act as though the appeal to the newspaper had been limited to charitable worthy objects. There is no question of an application of the cy-près doctrine.

It is conceded that, if the Act does not apply, ascertainable donors are entitled to have their money back.

In the present case the letter must be shown to contain an imperfect trust provision, in other words, consistently with the terms of the letter it must be shown that the fund could be disposed of for exclusively charitable purposes or could be used for non-charitable purposes. The purposes in the present case are the payment of funeral expenses, caring for the disabled and the "worthy causes." It was conceded in the court below that the payment of funeral expenses and caring for the injured boys were not charitable purposes, and it is not sought to resile from that concession. If the trustees held the fund primarily for those purposes and the surplus for other worthy causes, that would, prima facie, exclude the trust from coming in under the Act, because it would not be possible for the trustees to expend the whole fund on exclusively charitable purposes. If, however, there are separate interests created in several objects, then by section 2 (3) each can be treated as a separate disposition for the purposes of the Act.

In this case one fund was initially given for three different purposes. Every donor by making a contribution, that is, by his disposition, created more than one interest in the subject-matter of his disposition to be applied pro rata to all the purposes for which the fund was set up. Each contributor pro rata created separate interests in his contribution to the extent that separate interests were created in the whole fund. If a fund is found, against which persons have distinct separate rights, every contributor must create separate interests by making a contribution to that fund. The disposition is that which places the trustees in funds; that which creates the separate interests in the property. The disposition, therefore, creates the separate interests. If there is only one donor, his gift creates separate interests in the property, and if there are two or more donors, each gift is devoted to the objects of the appeal pro rata with the other gifts. The words "and then" mean that the good causes are not to come in until the preceding objects, that is, the funeral expenses and caring for the boys, have been satisfied. Apart from "and then" the words "among other things" would have left the trustees with a general discretion, but here it is plainly only the surplus which is to be applied to the worthy causes. Section 2 (3) is intended to apply to any fund where the property is given either for separate concurrent interests or successive interests. If that is not so, it is difficult to see what the provision can apply to.

Nothing in the Act suggests that there has to be in the trust provisions any express reference to charitable objects in the legal sense. All that is required is that the declared objects be such as to authorize the application of the fund to charitable purposes. The long title of the Act is consistent with that submission, though strictly it is not admissible as an aid to the construction of this section, since there is no ambiguity in the language.

J. V. Nesbitt for the trustees.

Eric Griffith for the Official Solicitor. Section 2 (3) does not apply, for there is no disposition creating separate interests in the moneys subscribed by the contributors. Even if the trusts to apply the balance of the fund to " worthy causes " had created a separate interest in the fund, the trust would not be validated by section 1 because, before the Act can operate to validate anything, there must be an intention in favour of charity.

Section 2 (3) requires the existence of a disposition creating separate interests in the fund. " The disposition " within section 2 (1) was made by the contributors to the fund. The legal title in the money was transferred to the trustees to be held on the trusts embodied in the appeal. That disposition did not create a separate interest in the fund in favour of each of the objects, because the terms of the appeal gave the trustees complete discretion as to how they should apply the fund between the several purposes. They could have spent the whole fund on one object. If they decided to apply it to more than one object, they were empowered to determine the proportions. Where the declared objects of a fund are in the nature of a discretionary trust, it is impossible to say that any separate interest comes into existence either when the trusts are set out in an appeal or when money is contributed on the terms of that appeal. An interest is only created when the trustees actually exercise their discretion. It would be impossible to contend, for example, that any donor contributing on the general terms of the appeal had created a separate interest in favour of the disabled boys. It was open to the trustees to decide, as they did, that the disabled boys had already been sufficiently cared for and that nothing further should be given to them. To come within the subsection the interest must be enforceable, but in this case, at the time when the contributions were made, no one could have said whether there would be any surplus to apply to the worthy causes. An interest which cannot be quantified is not enforceable. This was a trust affecting the balance, if and when there was any, but it was not a separate interest created ab initio. The appeal points out the limits beyond which the trustees must not go in applying the fund as a whole. Persons who might be entitled could come to the court to prevent application of the funds beyond those limits, but apart from that, no object of the fund had any power to control the application of the fund or any part of it. The amount which is to be surplus, if any, is declared by the act of the trustees. That act creates a distinct interest, and that may happen before the whole of the fund has been collected, but that is not sufficient to come within section 2 (3).

If that is right the second point does not arise, because it cannot be predicated, if the "worthy causes" were not a separate interest, that the whole of the fund could be applied exclusively to charitable purposes. If, however, the first submission is not accepted, then it is submitted that a trust for "worthy causes" is not in itself an imperfect trust provision within section 1 (1). The instrument must disclose on its face some intention of charity, but "worthy causes," though close to being charitable, and though no doubt covering causes which are charitable, are not necessarily charitable, and do not come within the section. It would lead to strange results if it were to be held that the Act went so far as to validate any trust which would be valid if the fund was applied exclusively to those of its objects which happened to be charitable. To come within the section it is essential that there should be a positive pointing out of charity; the mere possibility of application to charity not being inconsistent with the terms is not sufficient. Looking at the Act as a whole (and the long title is admissible to clear up any doubt as to the scope of the Act), one is driven to the conclusion that the section does not go beyond the case where there is a definite trust for charity coupled with one which is not charitable.

Buckley in reply. If, as the Official Solicitor has submitted, the trustees had complete discretion as to how the fund should be applied, they could have applied the whole of the fund to purposes which were exclusively charitable and then section 1 (1) would plainly have applied. But the true construction of the letter is that the trustees were bound to apply the money to the various purposes named and then to "worthy causes." It is submitted that a person incurring funeral expenses for one of the boys who had been killed could have sued the trustees if they did not indemnify him or her, and any boy who incurred expenses because of his injury could have sued under the second head if he was not compensated. It was only after the named purposes had been satisfied that the "worthy causes" came into operation. These are not discretionary but trusts which are enforceable to the extent to which each boy or his representatives was put to expense as a result of the disaster.

If that is right, there were separate interests in the fund which could only have been created by the contributors to the fund. The trustees held themselves out as prepared to accept contributions for certain purposes. They did not themselves create separate interests. It is only when the fund comes into existence that separate interests arise and the creators must be the contributors. They create separate interests in respect of their individual contributions. They cannot create them in respect of anyone else's contribution, but there must be the property before there can be an interest in it. What the separate interest is may not be capable of quantification at the moment when the contribution is made, but that is not material, for it can eventually be quantified. The donors have created separate interests which will be quantified in the light of events, just as much as a settlor who settles a fund " on such proportions as A " shall select " would have created a separate interest. The trustees merely act as the delegates of the declarer of the trusts making certain the proportions which the declarer has left uncertain. Anyone contributing to the fund must be assumed to have contributed for the purposes set out in the letter to the " Daily " Telegraph," for that is the only evidence as to the terms of the appeal which is before the court, and though the evidence is, admittedly, vague, it has not been disputed in any way. It is not quite accurate to say that nothing was spent in caring for the boys who had been injured, though the sums so spent were small.

It is said that the trusts have to be declared so as to refer expressly to charitable purposes. Reliance has been placed on the long title of the Act, but that is not admissible, for the language of section 1 (1) is clear. This is not a case where it can be said that the language used leads to an absurd result. This is a provision which was only intended to have a temporary operation, and to apply only to trusts which had survived for a specified period before the Act came into effect, and for one year thereafter. If the intention had been that the Act should only apply where there was an express reference to charitable purposes coupled with a non-charitable purpose, the section would have been framed differently. " Authorize " use for charity covers this case exactly. Even if reference to the long title is legitimate. it supports this contention rather than the other.

Cur. adv. vult.

July 2. LORD EVERSHED M.R., having stated the facts, said: There is no doubt that these trusts would altogether fail for uncertainty unless the terms of the Charitable Trusts (Validation) Act, 1954, can save them by limiting such trusts to charitable purposes. Harman J. held that the case was outside the purview of that Act, and (since he rejected the claim of the Crown to the fund as bona vacantia) that the moneys must be returned to the donors if and to the extent that they could be found. The claim of the Crown to bona vacantia has not been pursued. The question, therefore, on this appeal is whether the judge's conclusions in other respects were correct.

It will be noticed that the terms of the Act distinguish between (1) " an imperfect trust provision " which, to the extent and subject to the qualifications in the Act contained, is thereby validated, (2) the " instrument " in which the imperfect trust provision is contained, and (3) the " disposition " or " covenant " to which the Act is expressed to apply and in relation to which (alone) the validation takes effect. This threefold division of subject adds somewhat, upon the face of it, to the complexity of the Act's provisions, but its justification appears to be that whereas it is assumed that the imperfect trust provision will be contained in (though normally it will only form part of) an instrument (see, for example, section 1 (2)), the property (the beneficial enjoyment of which is, after all, the important thing to be dealt with) may be " disposed of " otherwise than by the instrument alone which contains the imperfect trust provision. A published appeal for contributions for some public cause will not by itself " dispose of " any property. The property to be held for the purposes of the appeal will be provided by contributors in response to the appeal. So, by section 2 (1), the Act is expressed to apply to any " disposition " of property to be held or applied for objects declared by an imperfect trust provision subject to the qualification at the end of the subsection.

Mr. Buckley's argument for the Attorney-General in the present appeal has applied these statutory provisions to the facts before us as follows. The relevant " instrument " is the statement of the objects of the appeal made by the mayors of Gillingham, Chatham and Rochester, published in the " Daily " Telegraph " newspaper on December 13, 1951. Harman J. observed truly that emotion is a bad foundation for such activity. One reason is that the appeal, if it expressed sincere emotional concern, manifested also a lack of the care and precision in formulation which are properly appropriate to instruments of this kind. It was suggested by Mr. Griffith that such was the looseness of its terms that the instrument conferred on the three mayors an absolute discretion to apply the moneys subscribed to any of the expressed objects to the exclusion of the rest. On this view, Mr. Buckley contended that all the terms of the instrument would form a single " imperfect trust provision " within the terms of section 1 (1) of the Act; since it would be competent for the mayors, consistently with the terms of the instrument so construed, to apply the whole fund to some charitable purpose by way of memorial to the boys killed and injured in the accident.

But Mr. Buckley—in my view rightly—did not accept this extreme view of the effect of the instrument, which disregards entirely the significance of the words "and then" before the final phrase "to such worthy cause or causes," etc. According to Mr. Buckley, the effect and meaning of the instrument is to impose an obligation on the three mayors to apply the funds contributed *first* in payment of funeral expenses and provision of care for the disabled (nothing significant being, according to the argument, contributed by the words "among other things"), and, *subject thereto*, to apply the rest of the funds "to such worthy cause or "causes," etc. Mr. Buckley conceded that the prior obligation (for funeral expenses and care of the disabled) was wholly non-charitable: but he claimed that the residual obligation in favour of "worthy causes" was an "imperfect trust provision" within the meaning of the Act: since "worthy causes" must necessarily include charitable purposes, and since, therefore, the mayors could "consistently with the terms of the provision" apply the whole residue to some charitable purpose or purposes. But Mr. Buckley conceded that even if he were right so far, it would not suffice for the success of his argument; for the validating provisions of section 1 (2) apply only "in relation to any disposition . . . to "which the Act applies." He had, therefore, further to show that the property now remaining in the hands of the mayors had been the subject of a disposition or dispositions to be held or applied for objects declared by "the imperfect trust provision." In other words, assuming that the various sums contributed, whether through the medium of collecting boxes at football matches and the like, or otherwise, were "dispositions of "property," the donors had provided them "to be held or "applied," that is, "for the purpose of being held or applied" for the objects declared by the imperfect trust provision (namely, for "worthy causes"), and for no other purposes. To achieve this result, Mr. Buckley invoked the terms of section 2 (3) of the Act, which reads: "A disposition in settlement or other disposi-"tion creating more than one interest in the same property shall "be treated for the purposes of this Act as a separate disposition "in relation to each of the interests created."

Harman J. rejected both the essential steps in Mr. Buckley's argument. He held that the phrase "to such worthy cause or "causes," etc. was of so vague and general a character that it fell altogether outside the purview of the Act and could not, therefore, constitute an "imperfect trust provision" within section 1 (1) any more than could (say) a provision that trust property was to be applied for such purposes as the trustees should in their absolute discretion think fit. But Harman J. also rejected Mr. Buckley's claim to invoke section 2 (3) of the Act: and it is this latter contention which should logically be first considered, since, unless Mr. Buckley can rely on section 2 (3), there is no "disposition" of property in relation to which the alleged imperfect trust provision can take effect, and his case breaks down in limine. The first question for determination is, therefore (paraphrasing and applying section 2 (3)), whether the contributors to this appeal, who must for this purpose be taken to have done so on the terms of that appeal as published, thereby created a distinct interest in the property which they contributed, namely, an interest in favour of the "worthy cause or causes" selected by the three mayors. Upon this question Harman J. said [1]: "He"—that is, the Attorney-General—"argued that the "instrument which, be it observed, has now changed its name "from being a 'provision' to being a 'disposition,' creates three "interests in the same property (the property being the sub- "scriptions), namely, funeral expenses, care, and other worthy "causes, and that, therefore, each must be taken separately, "and, so taking them, worthy causes might all be charitable and "thus satisfy section 1 (1), . . ."

Then later on, in dealing with other points, the judge said [2]: "In my judgment, section 2 (3) cannot be called in aid, as has "been claimed, for I do not think that the letter to the news- "paper 'creates more than one interest in the same property.' "In fact, the letter created no interest in any property at all. "It was merely an appeal which had the result of producing "property in the hands of the three mayors. When they "received it they were bound to devote it to the memory of the "boys, first by the two specified non-charitable activities, and "then by using the balance for worthy objects. The first two "purposes and the worthy objects cannot be described, in my "judgment, as different interests in the same property."

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[1] [1958] Ch. 300, 306; [1958] 1 All E.R. 37.

[2] Ibid.

Mr. Buckley challenged the judge's reasoning, in the passages cited, on the ground that he had looked rather to the terms and character of the " instrument " or of the (alleged) " imperfect " trust provision " which the instrument contained than to the " dispositions " consisting of the several contributions made in answer to, and upon the terms of, the appeal. There is, perhaps, with respect to the judge, some force in the criticism. I have earlier observed that a distinction seems to be made in the Act between the instrument, the imperfect trust provision contained therein, and the disposition in relation to which alone (so far as concerns the present case) any validation by the Act of the alleged imperfect trust provision can, according to the terms of the Act, take effect What Mr. Buckley therefore has to show—as he concedes—is that the " dispositions," consisting of the donors' contributions, were effective to create separate and distinct interests in the subject-matter of their contributions in favour of the " worthy causes " selected by the three mayors. But I have myself come in the end to the same conclusion on this matter as Harman J. I am prepared to agree with Mr. Buckley that the creation of a distinct interest is not negatived by the mere circumstance that the extent of that interest is not quantified and may not at the present time be capable of quantification. In the simple case where a man transfers certain property to trustees and directs such trustees, out of such property, to discharge certain obligations, and subject thereto to hold any balance in favour of A, he will, I apprehend, have created a distinct interest in A; and none the less so, though the amount of the prior obligations is uncertain, and therefore the amount of the balance uncertain also.

But the present case is by no means so simple. The vital words in section 2 (3) of the Act are, in my judgment, " creating " and " created." No doubt a contributor must be taken to have transferred the property in his gift to the three mayors with the intention of its being held and applied by them for the purposes stated in their published appeal. But it does not, in my judgment, follow that the contributor thereby, and by his act alone, " created " an interest in the subject-matter of his gift in favour of the worthy objects. It is no doubt tempting to try to seek an escape from a consequence which will leave the balance of the fund contributed virtually incapable of useful application—but the duty of the court must be to interpret the Parliamentary language, and I cannot for my part give to the precise word " create " so loose and benevolent construction as Mr. Buckley's argument requires. If an interest in favour of worthy causes can be said to have been "created" at all, it must have been by the joint effect of the disposition and of the instrument or the exercise by the three mayors of their wide and ill-defined powers under the instrument; and not by the disposition alone.

In the simple example which I gave above, the "instrument" containing the directions to the trustees, and the "disposition" of the property to be applied by the trustees, were contemporaneous; and notwithstanding the distinction generally drawn in the Act between the "instrument" (or the imperfect trust provision) and the "disposition," I cannot think that the distinction was very clearly in the draftsman's mind when framing section 2 (3) of the Act. Suppose that under the trust instrument there was a power of revocation and reappointment and that, shortly after a donor had handed a sum of money to the trustees of the instrument by way of addition to the trust funds, the power was exercised, it would be extremely difficult, as I conceive, to hold on any sensible use of language that the donor had "created" separate interests in favour of the objects of the reappointment. However that may be, and whatever may be the proper significance of the words "other disposition" in section 2 (3) of the Act, I do not think in the present case that the contributors can fairly be said to have by their dispositions created separate or distinct interests in favour of the "worthy objects" mentioned in the relevant instrument.

If this view be thought somewhat strict and narrow, it has at least some support in common sense. I take it that by the word "interest" in the subsection is meant a legal or equitable interest of a proprietary character, recognizable as such. The judge thought that no sensible effect could be given to the three words "among other things." But prima facie some effect ought to be given to all the language in the instrument; and, if so, then the intended effect of the words may be said to have been to permit the three mayors to apply the subscribed funds for any purposes which seemed good to them, being purposes of the same kind as, and in addition to, the instances of funeral expenses and care for the disabled, as prior obligations *before* coming to the residual obligations introduced by the words "and then." The application of a large part of the moneys actually spent in providing memorial gravestones for the boys who were killed may indeed well be justified as an instance of such "other things." If this view is right, then the effect of the residual phrase "and then to "such worthy cause or causes," etc., may well be said to be so remote and uncertain as to be disqualified as a proprietary interest of any recognizable kind. And I add that the result of giving such a meaning to the words "among other things" is not to make the prior obligation itself an imperfect trust provision; for it would not appear that there is any sufficient ground for saying that (on this view) the three mayors could, consistently with the terms of the instrument, apply the moneys exclusively for charitable purposes.

I, therefore, conclude, with Harman J., that the contention of the Attorney-General fails on this ground. It is accordingly unnecessary for me to express a view of my own upon the second question, whether the phrase "to such worthy cause or causes," etc., is itself capable of constituting an imperfect trust provision. I feel, as did the judge, considerable difficulty that a formula so vague and wide as "for such purposes as the trustees "think fit" could have been within the contemplation of the Act merely because such a formula would on the face of it allow the exclusive selection of charitable purposes. But the phrase in the present case is "to such worthy cause or causes in memory "of the boys who lost their lives . . ." and I feel also the force of Mr. Buckley's argument that such a phrase has within it at least the notion of charitable objects or objects analogous thereto: and that the sense of the phrase would not be materially different if it had run: "to such *charitable or* other worthy causes," etc. In the circumstances, therefore, I prefer to express no view of my own upon this part of the Attorney-General's case.

I would dismiss the appeal.

ROMER L.J. Two main questions were argued on this appeal. The first question is whether the last of the objects which were stated in the letter to the "Daily Telegraph" dated December 13, 1951, namely, "such worthy cause or causes in memory of "the boys who lost their lives as the mayors may determine," constituted an "imperfect trust provision" for the purposes of the Charitable Trusts (Validation) Act, 1954; and, secondly, on the assumption that it did, whether the contributions by the public in response to the letter constituted dispositions to which the Act applies within the meaning of section 2 (1) thereof.

Taking the second of these points first, it is clear that it only permits of an affirmative answer if the provisions of section 2 (3) of the said Act are applicable to the contributions. Mr. Buckley, for the Attorney-General, contended that they were. He conceded that neither of the first two objects set forth in the letter, namely, the defraying of the funeral expenses or caring for the boys who might be disabled, was charitable, but contended that each contribution created more than one interest in the money contributed and that the surplus now in the hands of the trustees represents a collection of separate interests created in relation to the third, or residual, object. I find myself unable to accept this view of the matter. Before section 2 (3) can apply at all to the present case it is necessary to establish (i) a "disposition" (ii) which creates more than one interest (iii) in the subject-matter of the disposition. It is, I think, clear that each contribution, whether it was of 1s. or of £100, was a "disposition"; and the only question, therefore, is whether it has been shown that the various donors created more than one "interest" in their contributions. I am quite prepared to assume that the contributors knew, or may be taken to have known, of the letter to the "Daily Telegraph," and, accordingly, that their gifts would be devoted (subject to the rather nebulous reference to "among other things") to the two objects first specified and subject thereto to the worthy causes therein mentioned. It appears, however, to be almost impossible, from a practical or common-sense point of view, to attribute to the donors an intention to create separate interests in their gifts in favour of the three objects respectively. It seems to me that the intention of a donor in writing a cheque or putting a coin in a collecting box, and the legal effect of his so doing, was to vest in the trustees a legal interest in the subject-matter of his contribution coupled with an obligation, enforceable in equity, to apply the gift in accordance with the provisions of the appeal. Subject to this, no interests, in my judgment, were "created" by the various donors in the contributions which they made. I recognize, of course, the desirability of applying the surplus of the fund which is now in question to charitable purposes cy-près; but for my part I cannot arrive at this result by holding that every person who put a coin in a collecting box created three interests (which must, of course, mean legal or equitable interests) in the coin, the third being subject to the first two. I would be disposed to agree with Mr. Buckley that it is no fatal objection that the donor was unable to quantify the interests, if he did in fact create them; but in my judgment no separate interests were created at all.

I, accordingly, agree with the judge on this point, and it therefore becomes unnecessary to consider whether a gift for "worthy causes," in the context of the "Daily Telegraph" letter, could properly be regarded as a disposition in favour of "an imperfect trust provision." The judge held that it could not and there appear to be powerful considerations which support his view. It may be that an "imperfect trust provision" under section 1 (1) of the Act is confined to cases where, among the declared objects for which property is to be held or applied, one at least is charitable; and that, accordingly, whilst a gift to "charitable or benevolent" objects would be within the Act, a gift to "philanthropic or benevolent" objects would not. It is not necessary, however, to express any concluded opinion upon the point, and I refrain from doing so.

I agree that the appeal should be dismissed.

ORMEROD L.J. I have had the opportunity of reading the judgments which have been delivered by my brothers and regret that I have felt compelled to reach a different conclusion.

The instrument setting out the trusts which are sought to be validated is a letter from the town clerk of Gillingham published in the "Daily Telegraph" on December 13, 1951. The material part of the letter is the first paragraph: "The mayors of Gillingham, Rochester and Chatham have decided to promote a Royal "Marine Cadet Corps Memorial Fund to be devoted, among other "things, to defraying the funeral expenses, caring for the boys "who may be disabled, and then to such worthy cause or causes "in memory of the boys who lost their lives as the mayors may "determine." The language of the letter is not altogether clear, but the intention appears to be that the money collected should be devoted first to defraying the funeral expenses of the boys who were killed and caring for those who were disabled and then that any money left after satisfying these objects should be used for such worthy cause or causes in memory of the boys as the mayors should determine. The precise meaning of the letter is made more difficult to determine by the use of the words "among "other things." But these words would not appear to give the trustees of the fund a wider discretion to dispose of the money than can be derived from the words "to such worthy cause or "causes," etc.

In order that the provisions set out in the letter may be declared an "imperfect trust provision" within section 1 (1) of the Charitable Trusts (Validation) Act, 1954, the objects of the provision must be so described that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes. Mr. Buckley agreed that this fund could

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GILLINGHAM BUS DISASTER FUND, *In re.*

Ormerod L.J.

not be so used exclusively, as neither the defraying of funeral expenses nor caring for the injured boys could be treated as charitable objects. Section 2 (1) provides that the Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision. Section 2 (3) reads as follows: " A disposition in settlement or other disposition creating " more than one interest in the same property shall be treated " for the purposes of this Act as a separate disposition in relation " to each of the interests created." In the circumstances of this case, therefore, section 1 cannot apply unless the fund consists of dispositions " creating more than one interest in the same " property," and whether this is so becomes the first question for consideration. The same considerations apply, in my judgment, whether the contributions to be considered consist of substantial sums paid by cheque by individual donors, or of small coins put in collection boxes at football matches, and on other similar occasions. The large contributors may take more care to ascertain how the money is to be applied, but all the contributors must, in my view, be taken to have given their contributions to be held and applied for the objects set out in the letter. It would seem to follow that each contributor has made a disposition of property to be so held and applied. The difficult question is whether in these circumstances each contributor has made a disposition " creating more than one interest in the same property." Mr. Griffith, on behalf of the Official Solicitor, argued in the first place that this could not be so, as the trusts were discretionary throughout, and the trustees could use the whole of the fund for any of the objects set out in the letter as they thought fit. I do not accept this construction of the town clerk's letter, but if it is the right one, there is no need to consider whether section 2 (3) applies, for, as Mr. Buckley pointed out, if the trustees have an absolute discretion, there is nothing to prevent them from applying the fund exclusively for charitable purposes, and the only remaining question would be whether the letter contained an " imperfect trust provision " as defined by section 1 (1).

But it was further argued by Mr. Griffith that such a disposition as has been discussed could not be regarded as creating more than one interest in the same property, since it could not be said at any time until the first two objects of the trust had been satisfied that there would be any sum left to be devoted to the " worthy cause or causes." It is, of course, true that the sum available, if any, could not be ascertained until the funeral expenses had been defrayed and the necessary provision made for the disabled boys. Had the circumstances of the accident been such as to throw no liability on the driver of the bus or his employers, the whole of the fund might well have been absorbed in fulfilling the two objects. It happened that the bus company acknowledged their liability to compensate the disabled boys and a substantial surplus is in consequence available for other purposes. It would seem on what I regard as the right construction to be put upon the letter that the representatives of the boys who were killed and injured could have enforced the performance of the first two objects for their benefit if the trustees had failed in their duty, and if the objects declared by the letter for absorbing the balance, if any, had been charitable objects, I can see no reason why the trustees could not have been compelled to devote any surplus from the fund to the furtherance of such objects. This appears to be an interest in the property which has been created by the person making the disposition, none the less because the amount which would be available could not be ascertained at the time the disposition was made and in spite of the fact that no part of the fund might ever be available. Section 2 (3) begins with the words " A disposition in settlement " or other disposition." It is not difficult to envisage the different interests in the same property which may be created where a disposition is made by way of settlement. It is more difficult to conceive a disposition other than in settlement which creates more than one interest in the property if interests of the kind here being considered cannot be taken into account. If there is a right to ensure that after satisfying certain specified objects the portion of a fund remaining shall be applied for other purposes, then in my view this must be an interest, even though it may be contingent on the existence of a fund for disposal.

The judge, in dealing with this part of the case, said: " I do " not think that the letter to the newspaper creates more than " one interest in the same property. In fact the letter created " no interest in any property at all." With this I agree. At the time of the publication of the letter there was no property in which an interest could be created. In my judgment it was the contribution to the fund on the understanding that it would be dealt with in the terms of the letter which constituted a disposition of property creating interests in those terms, and the actual " creating " of the interests was done in each case by the person making the contribution.

If section 2 (3) applies, and in my judgment it does, the question then arises whether the terms of the letter contain an "imperfect trust provision" within the meaning of section 1. Section 1 (1) reads: "In this Act, 'imperfect trust provision' "means any provision declaring the objects for which property "is to be held or applied, and so describing those objects that, "consistently with the terms of the provision, the property could "be used exclusively for charitable purposes, but could never-"theless be used for purposes which are not charitable."

Looking at the objects for which the property was to be held or applied, it appears that, at the least on the face of it, the property, although it could be used for purposes which are not charitable, could be used exclusively for charitable purposes consistently with the terms of the provision. If this be so, then it would seem that the provision is within the terms of the section. The judge referred to the long title, which reads as follows: "An "Act to validate under the law of England and Wales, and "restrict to charitable objects, certain instruments taking effect "before December 16, 1952, and providing for property to be "held or applied for objects partly but not exclusively charit-"able," and to enable corresponding provision to be made by the Parliament of Northern Ireland. He expressed the view that, as the long title shows, the Act was intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable or not wholly charitable, so long as the whole of the money could be devoted to charity. It may well be that such an intention on the part of the legislature can be inferred from the long title. On the other hand, the section appears to be in unambiguous terms and it is not the rule to invoke the assistance of the long title in the interpretation of a statute except in the case of an ambiguity. It would have been an easy matter for the legislature to have defined an imperfect trust provision as one where part of the fund was devoted to charitable purposes, but that was not done. The language of the section, in my judgment, is clear, and I can see no reason why the provision in this case does not come within it.

I would allow the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co. for Town Clerk, Gillingham; Official Solicitor.*

E. D.

In re ALLSOPP'S MARRIAGE SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* CHERRY AND OTHERS.

1958
May 20.

Vaisey J.

[1958 A. 546.]

Husband and Wife—Property—Settlement—Variation—Determinable life interest for husband—Discretionary trust in favour of issue of marriage after determination of husband's life interest—Order of Divorce Division extinguishing all interests of husband under marriage settlement as if he "had died in the lifetime of the "petitioner"—Whether discretionary trust extinguished by order.
Trust and Trustee—Protective trust.

By a marriage settlement dated September 6, 1916, a fund was settled on trust to pay the income thereof to the wife during the joint lives of the husband and the wife, and if she survived him to pay the whole of the income to her for the rest of her life, and if he survived her to pay the income to the husband for life, subject to determination in certain events. The settlement further provided that in the case of determination of the husband's life interest during his lifetime there was to be a discretionary trust in favour of the husband and "issue of the intended marriage." The parties were married on September 20, 1916, and there was one child of the marriage, a son, the second defendant. The marriage was dissolved on August 8, 1928, and by an order of the Divorce Division dated July 1, 1929, it was provided that the settlement of September 6, 1916, "be varied by extinguishing all the rights powers and "interests of the [husband] in and under the said settlement as if "he were already dead and had died in the lifetime of the [wife]."

On a summons to determine whether the order operated as a failure of the husband's life interest in the event of his surviving the wife, so that the discretionary trust would take effect, or as a failure of the trust in his favour by reason of his death during the wife's lifetime so that the discretionary trust could not take effect:—

Held, that the discretionary trust in favour of the husband and "issue of the intended marriage" was engrafted on the husband's determinable life interest and could have no separate existence; so that when that life interest was extinguished by the order of July 1, 1928, the trust engrafted on it was also extinguished.

ADJOURNED SUMMONS.

By a marriage settlement dated September 6, 1916, made in contemplation of a marriage between Winifred Violet Allsopp and Reginald Arthur Walter, certain property of the intended wife was settled on trust to pay the income thereof to the wife during the joint lives of the husband and wife, subject to the annual payment of £300 to the husband, and if the wife should survive the husband on trust to pay the whole of the income to the wife for the residue of her life. By clause 2 (iv), if the husband should survive the wife the income was to be held on trust for him during his life, but if he should do or attempt to do or should suffer any act or thing or if any event should happen whereby if the said annual income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof, then in any such cases as well as on his death the trust therein declared for payment to him of the annual income should determine. By clause 2 (v) if the husband's life interest should "fail or determine in his lifetime then during the "residue of his life" there was a discretionary trust "to apply "the annual income of the trust fund for the maintenance and "support or otherwise for the benefit of all or any one or more "exclusively of the others or other of the . . . husband and the "issue of the now intended marriage" as the trustees should think fit. By clause 3 the wife was given a limited power if she should marry again to revoke the trusts thereinbefore declared and to appoint the fund on such trusts for the benefit of any husband who might survive her and any child or children or other issue of such subsequent marriage.

The husband and wife were married on September 20, 1916, and there was issue of the marriage one child only, the second defendant, Michael Anthony Victor Walter who, at the date of the summons was without issue. The marriage was dissolved on August 8, 1928. By an order of the Divorce Division dated July 1, 1929, it was ordered that the said marriage settlement "be varied by extinguishing all the rights, powers and "interests of the [husband] in and under the said settlement as "if he were already dead and had died in the lifetime of the [wife] "and that the [wife's] power of appointment under clause 3 of "the settlement in favour of any husband who may survive her "and of any issue of a subsequent marriage be only exercisable "in the lifetime of the [husband] to the extent of three eighth "parts of the settled funds." The wife, the first defendant, married again on January 6, 1930, and there was issue of the marriage one child only, the third defendant, Vivian Ann Dowell.

The trustee of the marriage settlement of September 6, 1916, now asked the court to determine whether, on the true construction of the settlement and the order of July 1, 1929, varying the settlement, the extinguishment by the latter of all the rights, powers and interests of the husband in and under the settlement operated as a failure or determination in the lifetime of the husband of the trust to pay the income of the fund to him in the event of his surviving the wife so that the discretionary trust would take effect, or was to be regarded as a failure or determination of the trust for the benefit of the husband by reason of his death in the lifetime of the wife so that the discretionary trust could not take effect.

J. A. Armstrong for the plaintiff trustee. It is conceded that the jurisdiction exercised by the order of the Divorce Division is a jurisdiction to alter trusts, but the order in terms only affects "the rights powers and interests of [the husband]"; if the interests of any other persons are to be affected, it must be by necessary implication. The words "as if he were dead and had "died in the lifetime of [the wife]" are crucial. Do they mean that for the purpose of the condition in the opening words of clause 2 (v) the husband is to be treated as having died in the lifetime of the wife? If that was the intention of the order it is conceded that it had the effect of extinguishing the discretionary trust; but the subsequent provision in the order restraining the wife's power of appointment "in the lifetime of [the husband]" casts doubt on that intention. It is submitted that the only interests under the settlement intended to be varied were those of the husband. The interests of other persons were not affected. The Divorce Court, in exercising its jurisdiction to vary trusts, will not, as a general rule, affect adversely the interests of innocent persons. There appears to be an exception in the case of unborn persons (see *Webb* v. *Webb* [1] and *Bowles* v. *Bowles* [2]); but there the unborn persons were volunteers; here they are within the marriage consideration.

H. E. Francis for the defendants. First, remoter issue of the marriage are not objects of the discretionary trust. "Issue" in clause 2 (v) means children. The only child of the marriage was the second defendant, and, therefore, the only possible objects are the former husband and that only child who, both being sui juris, could bring the discretionary trust to an end.

Secondly, the order of the Divorce Division, which is not expressed in very precise language, operated to extinguish the discretionary trust. The husband had a protected life interest. The interests referred to in the order include this protected life interest which embraces a right to receive income until he does some act forfeiting that interest. The key words in the order are "as if he were already dead." The annuity of £300 payable to the husband during the joint lives of the husband

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[1] [1929] P. 159.

[2] [1937] P. 127; [1937] 2 All E.R. 263.

and wife has been extinguished as if he were already dead. The protected life interest for the husband in clause 2 (iv) has been extinguished as if he were already dead. The discretionary trust in favour of the husband and issue of the intended marriage in clause 2 (v) is engrafted upon the trust in clause 2 (iv) and cannot now arise if the husband is to be treated as dead. The substratum of the trust has gone. Clause 2 (v) speaks of the determination of the husband's life interest "in "his lifetime." But that life interest has failed not in his lifetime; it has been extinguished as if he were dead. At the date of the order there had been no forfeiture of the husband's life interest. The position was that the husband had an absolute interest in reversion to receive the income if he survived the wife. That interest was extinguished by the order. Therefore, the discretionary trust grafted onto that interest cannot now arise.

Vaisey J. stated the facts and continued: There is a general principle that one document does not vary another unless the intention to vary is reasonably plain, and it should be noted that the order does not say that the settlement is thenceforth to take effect as if the former husband were dead and had died in the lifetime of the former wife. The question is: What does it mean in the circumstances? The order is peculiar in this way, that, having first of all said that the husband's rights were all extinguished as if he were dead, it goes on to presuppose that the husband will continue to be living, because of the limit on the wife's right to withdraw property and to make a subsequent settlement.

There is no doubt that the husband's rights, powers and interests were extinguished by this order and I have come to the conclusion that if you extinguish the former husband's protected life interest, you extinguish it for all purposes; that the subsequent trusts in favour of the issue of the marriage are, so to speak, engrafted on to his life estate, and that when the parent tree (that is to say, the life estate itself) disappears, those engrafted trusts necessarily cease to exist or are finally precluded from coming into existence. Mr. Armstrong, appearing for the public trustee as the present sole trustee of the settlement, has argued that by extinguishing the rights of the former husband you do not extinguish any other rights and in particular you do not extinguish the rights of possible unborn issue of the marriage who might be regarded as still having their rights intact. That is a view which is possible on the literal reading of these words; but, on the whole, for the reason I have given, I do not think that that argument should prevail.

There is a certain amount of authority in these matters and I have been referred to two cases. *Webb* v. *Webb*[1] seems to show that a remainder in this kind of case can be disregarded, and *Bowles* v. *Bowles*,[2] which is not very helpful because I have nothing to rely on except the argument of Mr. Hodson (now Hodson L.J.), with which the judge seems to have been perfectly content, though he does not say so. But, looking at the matter from the common-sense point of view, it seems to me that it would be a rather capricious conclusion to reach, that, although the husband's contingent life estate in remainder has been completely extinguished, yet the ancillary trusts and powers which grow out of that life estate in the case of forfeiture and other incidents survive. On the whole, I think that the destruction of the life interest did destroy the interests of the unborn issue, and I will so decide.

There is no doubt that an order of the divorce court can operate so as to create a forfeiture; that is borne out by *In re Carew's Trusts*[3] before Eve J. and, although I agree that an order can so operate, I am not sure that that is relevant here. The life estate has been extinguished, and the substituted discretionary trusts in my judgment are so closely connected with, and so definitely grafted upon, the life estate which the Divorce Court has expressly destroyed that they can have no separate existence of their own. I think the proper declaration for me to make is that the effect of the settlement and of the order of the Divorce Court varying that settlement is completely to destroy and determine (or, rather, cause completely to fail) the husband's reversionary life estate and, together with that reversionary life estate, the contingent discretionary trusts which, upon the failure or determination of that life estate, were declared for the benefit of himself and the issue of the marriage. Those discretionary trusts seem to me to be wiped out as completely by the destruction of the life estate upon which they depended as if they had been expressly mentioned in the order of the Divorce Court.

Declaration accordingly.

Solicitors: *Gillhams for George T. Richards & Morgan, Bournemouth.*

P. P.

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[1] [1929] P. 159.

[2] [1937] P. 127; [1937] 2 All E.R. 263.

[3] (1911) 103 L.T. 658.

1958
Mar. 5, 12

Danckwerts J.

C. A.

1958
July 2, 3, 17.

Lord Evershed M.R., Romer and Ormerod L.JJ.

FRY *v.* INLAND REVENUE COMMISSIONERS.

[1957 F. 1229.]

Revenue—Estate duty—Interest in expectancy—Deferred payment of duty—Purchase by life tenant of interest in expectancy—Falling into possession—Whether estate duty payable on the purchase price or at the death of life tenant or not at all—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (6).

Statute—Construction—Argument ab inconvenienti—Relevance of results of alternative possible constructions—Equitable construction preferred—Estate duty statute.

A testator who died in 1918 had by his will settled a share of his residuary estate upon trust to pay the income thereof to his daughter, N., during her life and after her death the capital to be held upon trusts for her issue and, in default of issue, for her brothers, the testator's four sons.

One of the four brothers, C., died in June, 1940, and his executors elected not to pay estate duty on his reversionary interest in his father's estate at once but to wait until the same fell into possession.

By an agreement dated June 22, 1954, N. purchased from the plaintiff, the surviving executor of C.'s will, his reversionary share and the interests of her other brothers in their father's residuary estate. The price paid for C.'s share was £39,750, based on an actuarial valuation on the footing that no estate duty would be payable under the testator's will on N.'s death, and the agreement provided for satisfaction of the purchase price by transfer of investments. N. was at the date of the agreement over 80 years old, a widow, and she had had no children.

The plaintiff asked for a declaration by the summons whether a claim for estate duty on the value of the investments transferred to N. in respect of C.'s share should be made on the footing that his reversionary interest fell into possession in 1954 at the date of the agreement or whether estate duty would be payable on the value of that interest at N.'s death or whether no estate duty was or would ever be payable in respect thereof:—

Danckwerts J. *held,* (1) that on the purchase by N. in 1954 of C.'s reversionary interest, no interest in expectancy fell into possession, since she already had a life interest in the estate and by the purchase acquired the interests which would have taken effect in the event of her death without issue, but which conferred no right to possession at any earlier date than her death. Accordingly, no claim for duty could be made on the agreement under section 7 (6) of the Finance Act, 1894.[1]

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[1] Finance Act, 1894, s. 7 (6): "Where an estate includes an "interest in expectancy, estate duty "in respect of that interest shall be "paid, at the option of the person "accountable for the duty, either with "the duty in respect of the rest of "the estate or when the interest falls

(2) That, since the interest in expectancy did not fall into possession on the purchase in 1954, it would fall into possession in the estate of N. on her death, and the value of the interest would have to be ascertained at that time in accordance with section 7 (6) of the Finance Act, 1894.

In re O'Connor's Estate [1931] I.R. 98 followed.

Quaere. Whether the birth of issue to N. should still be considered theoretically possible so as to cause a possible opening of the merger of the life interest with the reversionary interest, so that the interests in expectancy were not indefeasibly vested when those interests were purchased in 1954.

Ward v. *Van der Loeff* [1924] A.C. 653; 40 T.L.R. 493; *In re Deloitte* [1926] Ch. 56; *In re O'Connor's Estate* (supra) considered.

On appeal:—

Held, (1) that the reversionary interest of C. "fell into possession" within the meaning of section 7 (6) of the Finance Act, 1894, when it was purchased by N., and that estate duty accordingly then became payable on it.

On the language of section 7 (6) it could not be said that it was plainly wrong to hold either that the reversion fell into possession when it was purchased by N., or alternatively, when she died; accordingly, as there were two possible constructions the court could take account of the unavoidable difficulties and inconveniences which could follow from the latter construction and prefer the construction whereby the reversion fell into possession when it was purchased by N.

Dictum of Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners* [1953] A.C. 267, 281; [1953] 1 All E.R. 418 applied.

(2) That that which became subject to duty on the date of the agreement in 1954 was the interest in expectancy and what had to be valued for the purposes of duty was what N. did not possess before, not the aggregate of that and her own life interest.

In re Eyre [1907] 1 K.B. 331 distinguished.

Decision of Danckwerts J. reversed.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of the Court of Appeal: By his will dated November 30, 1915, the testator, Francis Fry, settled a share of his residuary

"into possession, and if the duty is "not paid with the estate duty in "respect of the rest of the estate, "then—(*a*) for the purpose of determining the rate of estate duty in "respect of the rest of the estate the "value of the interest shall be its "value at the date of the death of "the deceased; and (*b*) the rate of "estate duty in respect of the interest "when it falls into possession shall "be calculated according to its value "when it falls into possession, "together with the value of the rest "of the estate as previously ascertained."

S. 22 (1) (*j*): ". . . 'interest in "'expectancy' includes an estate in "remainder or reversion and every "other future interest whether vested "or contingent, but does not include "reversions expectant upon the determination of leases."

estate on trust to pay the income thereof to Norah Lilian Cooke-Hurle (hereinafter called "Mrs. Cooke-Hurle") during her life and subject thereto upon trust, in the event of Mrs. Cooke-Hurle having no issue, as to one-quarter thereof for Conrad Penrose Fry. The testator died on November 4, 1918. Conrad Fry died on June 5, 1940, and the plaintiff, Sir Geoffrey Storrs Fry, was his surviving executor. Mrs. Cooke-Hurle, who was born on January 3, 1871, was still living, was a widow and had had no issue. On the death of Conrad Fry his executors had an option under section 7 (6) of the Finance Act, 1894, either to pay the estate duty in respect of his reversionary interest under the testator's will expectant on Mrs. Cooke-Hurle's death without issue together with the duty in respect of the rest of Conrad Fry's estate, or to postpone payment of duty until the interest should fall into possession. The executors elected to postpone payment of the duty until the interest should fall into possession.

By an agreement dated June 22, 1954, the trustees of Conrad Fry's estate agreed to sell and Mrs. Cooke-Hurle agreed to buy for £39,750 the reversionary interest of Conrad Fry in Mrs. Cooke-Hurle's settled share of the residuary estate of the testator. The purchase price was arrived at on an actuarial valuation made on the footing that no estate duty would be payable under the testator's will on Mrs. Cooke-Hurle's death. The agreement was completed and the purchase price paid on or about November 1, 1954. In addition to purchasing the reversionary interest of Conrad Fry in her settled share, Mrs. Cooke-Hurle also agreed, by the same agreement, to purchase the other reversionary interests in her share. The result of the transaction was that Mrs. Cooke-Hurle became the owner of all the interests in remainder in her settled share and as, in view of her age, there was no possibility of her thereafter having issue, the trustees of the testator's will transferred into her sole name the investments then comprised in her settled share of the residuary estate of the testator.

As a result of correspondence between the plaintiff's solicitors and the Estate Duty Office as to what (if any) estate duty had become payable, or would in the future become payable, by the estate of Conrad Fry by reason of the said agreement, the plaintiff, on October 15, 1957, issued an originating summons. The questions which the court was asked to determine were, so far as relevant to this report, as follows: first, whether, "having "regard to the completion of the purchase on or about Novem-"ber 1, 1954, by Norah Lilian Cooke-Hurle of the interest in the "residuary estate of the late Francis James Fry to which Conrad "Penrose Fry was at the date of his death on June 5, 1940, "contingently entitled in reversion expectant on the death of the "said Norah Lilian Cooke-Hurle without issue, (a) the said "contingent reversionary interest . . . will never fall into posses-"sion for the purpose of section 7 (6) of the Finance Act, 1894, "or (b) the said contingent reversionary interest will fall into "possession for that purpose on the death of the said Norah "Lilian Cooke-Hurle (if she dies without issue), or (c) the said "contingent reversionary interest fell into possession for that "purpose on the date of the completion of the said purchase." Secondly, the court was asked how the value of the interest ought to be calculated for purposes of estate duty in the event of it being determined that the interest would fall into possession for the said purpose on the death of Mrs. Cooke-Hurle. The third question was, if it fell into possession on the date of completion of the purchase, whether the value ought to be treated (a) as equivalent to the open market price of the interest if sold at that date to a person other than Mrs. Cooke-Hurle, or (b) the price actually paid, £39,750, or (c) the value at that date of the investments representing the fund in which the reversionary interest was purchased, or (d) some other sum.

J. Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the plaintiff.

R. O. Wilberforce Q.C. and *E. B. Stamp* for the Commissioners of Inland Revenue.

Cur. adv. vult.

March 12. DANCKWERTS J. read the following judgment: The question to be decided on this originating summons is the liability for estate duty in respect of a reversionary interest to which Conrad Penrose Fry was entitled at his death in 1940, and which has been purchased from his executor by the person entitled for her life to the income of the property.

The history starts with the will dated November 30, 1915, of Francis James Fry (hereinafter called "the testator"), who died on November 4, 1918. By that will the residuary estate was settled upon trust to pay the income thereof to the testator's daughter, Norah Lilian Cooke-Hurle, during her life and after her death the capital was to be held upon trusts for her issue and, in default of issue, for her brothers, the testator's four sons. As Mrs. Cooke-Hurle is now over 86 years of age, is a widow, and has had no children, it is and has been for a great many years a certainty that the trusts in favour of the brothers must take effect on her death.

One of the four brothers, Conrad Penrose Fry, died on June 5, 1940. His executors elected not to pay estate duty on this reversionary interest in one quarter of the residuary estate of his father, but to postpone payment until that reversionary interest should fall into possession. By an agreement dated June 22, 1954, Mrs. Cooke-Hurle (who was then 83 years of age) purchased from the plaintiff, the trustees of another deceased brother's will (who was also the assignee of the share of a third brother), and the trustees of a settlement made by the remaining brother, all the four reversionary shares in the father's residuary estate. The price paid for Conrad Penrose Fry's share was £39,750. This was based on an actuarial valuation made on the footing that no estate duty would be payable under the testator's will on Mrs. Cooke-Hurle's death. On the basis that Conrad Fry's interest, if sold to some other person, would be subject to estate duty on Mrs. Cooke-Hurle's death at a rate of 65 per cent., the actuary calculated that the value of the reversionary interest was £13,900 only.

The agreement provided for the satisfaction of the purchase price by the transfer of investments forming part of Mrs. Cooke-Hurle's free estate equivalent in value to the amount of the purchase price as valued on March 9, 1954.

There was no provision in the agreement in regard to merger, but upon the completion of the purchase the trustees of the testator's will transferred to Mrs. Cooke-Hurle all the investments comprised in the settled share of which she had been enjoying the income.

A claim for estate duty on the value of the investments transferred to Mrs. Cooke-Hurle in respect of Conrad Fry's share has been made by the Commissioners of Inland Revenue on the footing that his reversionary interest fell into possession in 1954 on the purchase by Mrs. Cooke-Hurle. An alternative claim is made that estate duty will be payable on the value of that interest on Mrs. Cooke-Hurle's death.

It is contended on behalf of the plaintiff that no estate duty is or ever will be payable in respect of Conrad Fry's reversionary interest, as that interest has not fallen and now can never fall into possession. The value on which estate duty is claimed is also contested.

The sections of the Finance Act, 1894, which affect the matter are as follows: Section 1 provides: "In the case of "every person dying after the commencement of this part of this "Act, there shall, save as hereinafter expressly provided, be "levied and paid, upon the principal value ascertained as herein-"after provided of all property, real or personal, settled or not "settled, which passes on the death of such person a duty, called "'estate duty' . . . ."

There is no dispute that on Conrad Fry's death his reversionary interest either "passed" or was caught by the terms of section 2 (1) (*a*) (as suggested by Lord Macnaghten in *Inland Revenue Commissioners* v. *Priestley*,[1] and by Hamilton L.J. in *In re Avery*.[2] [His Lordship read section 7 (6) and continued:]

By section 22 (1) (*j*) there is a definition: "The expression "'interest in expectancy' includes an estate in remainder or "reversion and every other future interest whether vested or con-"tingent, but does not include reversions expectant upon the "determination of leases."

There is no doubt that Conrad Fry had an interest in expectancy at the date of his death.

There is no definition of the words "fell into possession." The meaning must, therefore, be ascertained by regard to ordinary legal English. The definition offered by counsel for the executor is that an interest in expectancy falls into possession when the holder of the interest becomes entitled by virtue of the interest to present enjoyment of the property. It was contended, therefore, that on the purchase Mrs. Cooke-Hurle did not become entitled to present enjoyment of the property by virtue of the interest in expectancy because she had already present enjoyment by virtue of her life interest. This interest, it was said, was enlarged into absolute ownership as a result of the purchase, and the merger consequent thereon, and, therefore, the interest in expectancy can never fall into possession.

It seems to me desirable at the outset to consider the nature and effect of merger. But, first of all, though the liability to estate duty arose by reason of the death of Conrad Fry, was there any charge on the interest of Conrad or the property created thereby? No doubt the executors were accountable under section 8 (3) of the Act, but unless the property did not pass to the executor as such no charge would be created under section 9 (1). Although the interest of Conrad Fry was an equitable interest, it would appear to have been a legal asset (personal property), and, therefore, passed to the executor as such: see

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[1] [1901] A.C. 208, 213; 17 T.L.R. 507.

[2] [1913] 1 Ch. 208, 217.

Mutlow v. *Mutlow*.[3] Accordingly, the matter is not complicated by any charge of duty upon the interest or the property.

In Challis, Real Property, 3rd ed., pp. 86 and 87, quoting Preston's Conveyancing, the rules in regard to merger are stated as follows: " A contingent remainder, not being in the eye of the " common law an estate, but only a possibility to have an estate " at a future time upon the happening of a contingency, did not " suffice to prevent merger, if interposed between two vested " estates, which were otherwise such that the one would merge " in the other.

" But there was in this respect an important distinction " between cases in which the two vested estates came to the same " hand subsequently to the creation of the contingent remainder, " and cases in which they came to the same hand eo instanti with " the creation of the contingent remainder. In the former case, " the merger was absolute, and thereby the contingent remainder " was for ever destroyed. But in the latter case, the merger was " not absolute, and the two estates united by it remained, " according to the language in use, liable to open and let in the " contingent remainder, provided that it became vested during " what would have been the continuance of the precedent estate " if it had not been merged."

In the present case, the two interests plainly came to the same hand subsequently to the creation of the contingent remainder. Of course, the two interests were both equitable interests in personal property. But that is immaterial, as the same rules were applied in equity, except that where merger was possible, equity applied the intention of the parties, and, if their intention was not expressed, assumed an intention to cause merger, if this were beneficial: *In re Fletcher*, *Reading* v. *Fletcher*.[4]

Since the Judicature Act, 1873, s. 25 (4) (now the Law of Property Act, 1925, s. 185), the rules of equity are applied in any case. I suppose counsel for the executor would say that it was in the interests of the parties to effect merger, if this would defeat a claim for estate duty. But I apprehend that this would not eliminate the possibility of the two interests reopening to let in a contingent remainder or other interest in expectancy.

In the Irish case of *In re O'Connor's Estate*,[5] the interest of a man expectant on the death of his brother without issue was treated as not falling into possession for the purposes of duty until the brother died without issue, notwithstanding that the interest in expectancy on the earlier death of the owner of the expectancy in the lifetime of the other brother came to the latter (the tenant for life) as his heir-at-law, so that he had both the interests. The Irish court seems to have treated the interest in expectancy as a contingent interest, though it may be more accurate to regard it as a vested interest liable to be divested by the birth of issue of the tenant for life.

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[3] (1859) 4 De G. & J. 539.

[4] [1917] 1 Ch. 339.

[5] [1931] I.R. 98.

In the Irish case the tenant for life was a man, and a man is always treated by the law as capable of having issue until his death. Is the position of a woman any different? It is true that the Chancery Division permits trustees to dispose of property in the course of administration without regard to the possibility of the birth of children to a woman who is past the normal limit of childbearing. But this practice has not been applied in cases where some rule of law is involved, for instance, the rule against perpetuities: *Ward* v. *Van der Loeff*,[6] or the rules restricting accumulations: *In re Deloitte*.[7]

Of course, the trustees of the testator's will were perfectly safe in handing over the investments forming the trust fund to Mrs. Cooke-Hurle in 1954, as she was then 83, and there was no possibility of her having any issue in fact. Ought I to regard birth of issue as still theoretically possible so as to cause a possible opening of the merger, so that the interests in expectancy of the brothers were not indefeasibly vested when these interests were purchased in 1954? And, if not, does the impossibility of the birth of issue make any difference to the situation? If the possible defeasance by the birth of issue has disappeared, at what particular moment of time did it disappear? The final impossibility of issue varies with individuals and with circumstances. On the other hand, it was possible to say with certainty in 1954 that there could no longer then be any chance of issue. These seem to me to be difficult questions, but I do not find it necessary to answer them.

As is apparent from the rules which I have mentioned previously, the theory of the merger of estates is a highly artificial idea. I am not satisfied that such theoretical and obsolescent rules ought to be allowed to decide liability to estate duty. The facts are that Mrs. Cooke-Hurle had a life interest in the income of the fund; when she purchased the interests in expectancy of her brothers in 1954, she also acquired the interests which would take effect in the event of her death without issue, but would confer no right to possession at any earlier date than her death. It is true that (on the footing that the birth of issue of Mrs. Cooke-Hurle was no longer a possibility) after the purchase no one but Mrs. Cooke-Hurle had any interest in the trust fund, and so the trustees handed over the investments comprising the trust fund to her. I do not regard that as the same thing as the falling into possession of the interest in expectancy. If the interest in expectancy did not fall into possession on the purchase in 1954, it seems to me that it will fall into possession in the estate of Mrs. Cooke-Hurle on her death.

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[6] [1924] A.C. 653; 40 T.L.R. 493.

[7] [1926] Ch. 56.

This accords with the result which was reached by the Irish court in *In re O'Connor's Estate.*[8] That case, of course, is not binding on this court, but it does show that such a result was considered by another court to be possible. To reject such a result seems to me to defeat the intention of section 7 (6) of the Finance Act, 1894, and to abuse the indulgence conferred by that subsection.

The difficulties of valuation which may arise on Mrs. Cooke-Hurle's death were commented upon in argument. I am afraid that these will have to be faced when the time for payment arises. The value of the interest when it falls into possession will have to be ascertained at that time in accordance with the provisions of the Act. This must depend upon the circumstances at that date. I am not prepared, and I am not compelled, to express any opinion in advance of the event.

Declaration accordingly.

[Reported by JENNIFER WEST, Barrister-at-Law.]

The plaintiff appealed.

J. Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the plaintiff. There are two alternative submissions. First, that the interest in expectancy fell into possession at the date of the contract of sale to Mrs. Cooke-Hurle, the life tenant, or, alternatively, that it has never done so. In the first case duty is payable on the value as at the date of falling into possession, and in the case of a bona fide sale, such as the present, the natural measure of value is the price which the life tenant paid for the interest. In the alternative, no duty is payable.

It is common ground that the interests of issue of the life tenant can be ignored, for she was clearly incapable of having any. The trustees were entitled, and indeed bound, to transfer the investments to her on completion of the purchase without regard to the interests of issue. The interest which she purchased was a vested remainder subject only to defeasance on the happening of an event which was impossible.

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[8] [1931] I.R. 98.

At the death of the life tenant there is no change in the title or enjoyment of the settled property; no interest falls into possession at that date, for as from the date of the sale the life tenant has been the absolute owner. The official view involves writing into the statute the words " when the interest is limited to fall " in under the terms of the settlement," and it produces results which in some cases may be chaotic. For example, if the purchasing life tenant is young, it may well be impossible at his or her death to trace the property—there may be none left. The normal scheme for payment of duty is that it is payable at the time when the person liable to pay has money in his hands. Where the executors have sold, as in this case, the investments are no longer at their disposal but are under the power of the life tenant. But, if the official view is right, the executors remain liable to pay duty at some future date. The investments may increase in value or be dissipated and the executors must remain uncertain as to sums which will ultimately have to be paid, and they will be unable to wind up the estate. The duty may even exceed the amount which they have received for the reversionary interest. It is said that the executors have an option and need not sell, but they may be obliged to sell in the course of administration and it would be their duty to sell to the highest bidder, who would almost certainly be the life tenant. If the interest was sold to a third party, the liability for duty (apart from commutation) would be calculated on the then value.

" Falls into possession " in this subsection means that the owner becomes entitled to the present enjoyment and gets the present power of alienation over the property. The commoner acceleration of falling into possession is when the life tenant surrenders to the reversioner. At that moment the reversioner becomes for the first time the absolute owner and is for the first time entitled to the enjoyment of the property over which he has the right of disposition.

If the purchasing life tenant had been a young woman, the date when the interest fell into possession would not have been the date of the purchase, as in this case, but the date when she became entitled to have the fund transferred to her. Duty is payable on the value of the reversion at the time when the fund is in fact handed over or when the trustees become liable to hand it over. The meaning of the words in the statute must be exactly the same in the case where the life tenant purchases as in the converse case where the life interest is surrendered.

The words of the statute must be given their ordinary meaning, but in determining that meaning it is legitimate to take account of the effect of alternative constructions. Where there are two possible meanings, the court will prefer a meaning which gives a workable result to one which produces chaos, even if in some cases it may mean that no duty is payable: *Coutts & Co.* v. *Inland Revenue Commissioners.*[1]

When the investments have been transferred to a purchasing life tenant, the trust fund as such will have ceased to exist in fact. Even if it is regarded as notionally continuing throughout the lifetime of the life tenant, there may be real difficulty in discovering of what it consists at the death. The estate duty office were asked in this case to state on what property the claim would be made, but they have not replied. The only sensible construction is to say that the property falls into possession when in fact it does so. It is then clear what the property is and duty can be charged on the interest in that property which has fallen in. On the purchase of a reversionary interest the life tenant's right of present enjoyment is enlarged to include the right of present disposition. That represents the taking into possession of the interest formerly possessed by the reversioner and now assigned to the life tenant.

The contention of the Crown that, if the plaintiff's first submission is correct, duty is chargeable at the date of the sale not only on the interest which has been acquired but on the whole property was only dealt with obliquely in the court below because in the view which the judge took of the first question it did not arise. It is submitted that the interest which fell into possession as at the date of the purchase was what was sold. Merger depends on intention, and the court is not concerned with that but with the origin of the interest which has coalesced. After the purchase the life tenant had the life interest (which she had possessed previously) and also the reversion which she had just acquired. The value of the reversion at that time should be measured by dividing up the value of the whole, and a fair measure of value is how much was paid to the executors. [Reference was also made to *In re Parkes' Settlement.*[2]]

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[1] [1953] A.C. 267, 281; [1953] 1 All E.R. 418.

If, however, this is wrong and the interest did not fall into possession at the date of the purchase, the only remaining possibility is that it never has and never will fall into possession. If that is correct, the section wholly fails and no duty is payable. This is an integral part of the machinery of the statute and the words of a taxing statute must not be strained so as to cover something which is not fairly and squarely within the charge to tax. *In re O'Connor's Estate*[3] is distinguishable, for there the interest was contingent and the present question did not arise. The case was concerned with questions arising where the limitations of the settlement had taken their natural course.

R. Cozens-Hardy Horne following. It is important to remember that the section applies to contingent and to vested interests. When an interest falls into possession means "when and if." It may seem odd that the executors, having decided to exercise the option to defer payment of duty till the interest falls into possession, should be able to say that it never does so, but that may happen in a number of cases. This may be something that the draftsman did not think about when the section was drafted. But as Lord Simonds said in *St. Aubyn* v. *Attorney-General,*[4] a claim is not admissible unless it comes "fairly and squarely" within the ambit of a taxing statute. It is not what is aimed at but what transaction the section actually hits.

R. O. Wilberforce Q.C. and *E. B. Stamp* for the Commissioners of Inland Revenue. There are two possible constructions of the subsection. [Reference was made to Craies on Statute Law, 5th ed. (1952), p. 84.] Duty becomes payable when the tenant for life dies, or if that is wrong and duty is payable when the sale takes place, it is payable on the value of the whole property. The first construction is embodied in a long-standing official practice derived from *In re Eyre.*[5]

An interest falls into possession when the event happens on the happening of which, according to the terms of the settlement, the interest ceases to be expectant. This is a natural and legitimate interpretation of the words in the subsection. "Falls" naturally points to some external event, not a man-made event. The event on which the interest ceases to be expectant will always happen. An "interest falling into possession" does not mean that the "property comes into the possession of someone." This construction has the advantage that the executors know that duty will be payable at a fixed date. They do not have to consider periodically whether by the terms of the settlement and the subsection events have happened which may have caused the interest to fall into possession. Difficulties of valuation are undoubtedly conceivable, but there has not yet been a case in which they have been insuperable, and they can be dealt with as they arise. Duty has to be calculated on the value at the date when the event happens on which the duty was expectant. The executors are, admittedly, at the mercy of the tenant for life, but they are not obliged to sell the reversion. It is not conceded that the draftsman did not anticipate this sort of case. The Succession Duty Act, 1853, dealt with similar questions.

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[2] [1956] 1 W.L.R. 397; [1956] 1 All E.R. 833.

[3] [1931] I.R. 98.

[4] [1952] A.C. 15, 32; [1951] 2 All E.R. 473.

[5] [1907] 1 K.B. 331.

This is not a case where it is sought to bring a claim within the ambit of the charging section. It is already in it, and the sole question is as to the date when the duty is payable. If it should be held that the provision does not apply, the effect would not be that no duty was payable but that the executors would have to pay duty as if no option had been given. [Reference was made to *Inland Revenue Commissioners* v. *Priestley.*[6]] The provision is merely administrative machinery. Payment of duty could only be avoided altogether if it was shown that there was nothing at the relevant time; if, for example, the fund had gone altogether. This is not a case of a valuation subject to a contingency, the happening of which will reduce the value of the interest to nothing. Such a contingency would have to be taken into account in valuing the interest, and the value might well be nothing at the date of death. But this interest is not inherently valueless. Nor is the case analogous to the case of a gift inter vivos which has ceased to exist at the death. Here the charge for duty arises when the testator dies, and the only question is when duty is payable.

It is agreed that for the purposes of this case any possible interest of any children of the tenant for life can be disregarded.

The dictum of Hanna J. in *In re O'Connor's Estate* [7] is in point, and although it is not, of course, binding, it is an expression of judicial opinion which the court would no doubt wish to take into account.

If, however, this is not accepted, and the interest in expectancy in this case fell into possession when the sale was made, the question then is whether for purposes of valuation the interest should be treated as it was immediately before it fell into possession or immediately afterwards. The section assumes that the beneficiary is in possession of the whole property and, logically, he cannot split it up again to ascertain the value of the previous interest in expectancy. The property must be treated as an interest in possession without regard to the life interest. It is inconsistent to say that an interest which has fallen into possession still exists in expectancy. The issue is made clearer by consideration of the converse case of a voluntary surrender to a reversioner. The reversioner gets the whole property—which must be valued then as an interest in possession: *In re Eyre*.[8] In this case the act of the parties has accelerated what would have happened naturally in the end. The section contemplates that duty will be paid at some time on the whole property, and it is logical that, if that moment is accelerated, the payment should be made immediately. As there are two possible interpretations of the subsection, it is not open to the court to reject both and to say that no duty should be paid at all. Duty could only be avoided if the reversion was valueless, or if the machinery for valuation could not be worked so that the interest could not be valued. Where there is no doubt that duty is chargeable, the machinery must be adapted: *Shrewsbury (Earl of)* v. *Inland Revenue Commissioners*.[9]

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[6] [1901] A.C. 208; 17 T.L.R. 507.

[7] [1931] I.R. 98.

E. B. Stamp following. "Falling into possession" means becoming entitled in possession to the property in which the interest subsists. The section is a machinery section which allows the taxpayer to postpone payment until he gets possession of the property. He may get it prematurely, as in this case, because he buys it or because the tenant for life releases his interest to the reversioner, but in both cases the effect is the same. Having got the property, there is no hardship in having to pay duty, though he may have got it prematurely. In purchasing the reversion he should take into account the fact that acceleration will mean making payment prematurely.

J. Pennycuick Q.C. in reply. In the ordinary case where duty is payable on the death of a life tenant, the value on which duty is paid is that of the whole property, but that is not so in the present case. When the interest fell into possession the two existing interests coalesced in the single hands of the life tenant. The value of the whole property is the sum of those two interests.

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[8] [1907] 1 K.B. 331.

[9] [1956] T.R. 383.

There is no reason why the interest in expectancy should be treated as equivalent to the value of the whole property. The life interest has not gone. The life tenant is still alive and is still entitled to possession of the property by virtue of her life interest, which has now been enlarged into absolute ownership. In the old days that interest would have merged with the other, but merger depends on intention and it is always open to a beneficiary to make a declaration against merger. It would be strange if liability for duty should depend on whether such a declaration had or had not been made. There is no reason why the relevant moment for valuation should be immediately after the purchase. The section says "when" the interest falls into possession. That is "at the moment when" and at the then value of the interest. The headnote to *In re Eyre* [10] is not an exact reproduction of what the judge said, but, even if the valuation is to be made immediately after the purchase, the life tenant was at that moment in possession of two interests. It is not the property which has to be valued but the interest at the moment of maturing.

On the natural meaning of the words in the section, where an interest "falls into possession" by coalescence, each of the interests should, therefore, be valued separately. The measure of value is the purchase price which has been bona fide paid to the selling executor.

If the interest never falls into possession, no duty is payable. This is not a defect in mere machinery of the statute but affects the description of the property to be charged. The property to be charged is the interest when it falls into possession. If it does not fall into possession, there can be no property within the charge.

Cur. adv. vult.

July 17. LORD EVERSHED M.R. The judgment which I will ask Romer L.J. to read is the judgment of the court.

ROMER L.J. This appeal raises a somewhat difficult question as to the construction of section 7 (6) of the Finance Act, 1894, which deals with the payment of estate duty on interests in expectancy. [His Lordship stated the facts as set out above, read sections 7 (6) and 22 (1) (*j*) of the Finance Act, 1894, and continued:] Counsel for the plaintiff and for the Inland Revenue Commissioners were agreed before us that, having regard to

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[10] [1907] 1 K.B. 331.

Mrs. Cooke-Hurle's age in June, 1954, when she agreed to purchase Conrad Fry's reversionary interest, the contingency of her having issue could and should be disregarded; and accordingly that the case should be dealt with on the footing that the interest which Conrad Fry's executors had and which Mrs. Cooke-Hurle purchased from them was an indefeasibly vested, and not merely a contingent, remainder in Mrs. Cooke-Hurle's settled share.

The question, then, which falls for decision can be posed as follows. A testator settles a fund on trust for A for life with remainder to B absolutely. B predeceases A and his executors exercise the option conferred by section 7 (6) of the Finance Act, 1894, to defer payment of duty on the reversionary interest until the interest falls into possession. A subsequently purchases the interest from B's executors. What duty (if any) falls to be paid by B's executors in consequence of the purchase. when is it payable, and how should it be assessed?

It would seem that there are four possible answers to this question. The official view (which was upheld by the judge's declaration) is that no duty is payable by B's executors until the death of A and that then duty will become payable on the value of the fund as then existing. The alternative official view is that duty becomes payable upon the execution of the sale agreement and that such duty is assessable upon the value of the fund (and not merely on the value of the reversion) at the date of the agreement. The plaintiff contends that duty becomes payable upon the execution of the sale agreement but that such duty is only assessable upon the then value of the reversionary interest. The plaintiff alternatively contends that no duty is payable or ever will become payable at all.

There does not appear to be any decided case which has any direct bearing on the present problem. Reference was made to some observations by Hanna J. in *In re O'Connor's Estate*,[1] but the circumstances of that case differed in a vital respect from those of the present. In *In re O'Connor's Estate*[1] real estate was devised on trust for A for life with remainder to his children as he should appoint, and if there should be no son of A who should attain the age of 21 years then in trust for B. B died in A's lifetime and A (who was B's administrator and heir-at-law) postponed payment of estate duty in respect of B's contingent interest. Subsequently A died without issue and a question arose as to the liability of B's estate to payment of duty in respect of B's interest in the devised land. It was held that the Inland Revenue Commissioners were entitled to claim estate duty on the death of B in respect of his contingent estate in the lands which passed on his death to A and that the rate of duty was to be calculated according to the value of that interest when it fell into possession on the death of A together with the value of the rest of B's estate. In the course of his judgment Hanna J. said[2]: "In my "opinion an interest in expectancy, within the meaning of the "Act, whether it be in remainder or reversion, or whether vested "or contingent, 'falls into possession' within the meaning of "section 7 (6) when the events which rendered it in expectancy "have happened, and there has accrued an immediate right to "present enjoyment of the property by actual occupation, or "receipt of rents and profits. . . . The death of A is the event "which, under the option given by section 7 (6), makes the "duty on the death of B alternatively leviable and payable."

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[1] [1931] I.R. 98.

We do not derive much assistance from these observations in the present case. The point which is now before us does not appear to have been argued, and in any event B's reversionary interest remained contingent down to the date of A's death, whereas in the present case Conrad Fry's reversionary interest had become vested, by reason of Mrs. Cooke-Hurle's age, at the time when she acquired it. It clearly cannot be contended that a contingent reversionary interest ripens into an interest in possession unless and until the contingency occurs; but different considerations may well arise where, as here, the reversionary interest is vested and indefeasible.

The question, then, before us is free from authority and falls to be determined on the meaning and effect of the language of section 7 (6) of the Act. The subsection is not drafted with strict accuracy on any view of the matter. It speaks of an interest in expectancy falling into possession, whereas such an interest always is in possession from the date when the instrument which creates it takes effect. What does, or may, fall into possession is the property in respect of which the interest in expectancy has been created; and it was presumably in that sense that the legislature referred to the interest itself falling into possession. Apart altogether from this inaccuracy of language the provisions of the subsection are by no means easy to apply to cases where a life tenant sells or voluntarily surrenders his life interest to the remainderman or where, as here, the life tenant purchases the interest of a deceased reversioner; and it is, we think, a fair assumption that in fact the draftsman of the subsection had no such possibilities in mind.

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[2] [1931] I.R. 98.

As we have previously indicated, the official view of the Inland Revenue Commissioners is that where a life tenant purchases a vested reversion in the settled property, and payment of duty has been postponed, in pursuance of the statutory option, on the reversioner's death, the resulting coalescence of interests should be disregarded for relevant purposes and that no duty becomes payable until the life tenant actually dies. Mr. Wilberforce frankly conceded that this view may lead to difficulties and inconvenience, but he submitted that it is justified by the language in which the subsection is framed. The contention is that an interest in expectancy " falls into possession " when that event occurs upon the happening of which the interest was expectant in accordance with the terms of the instrument which created the interest. The Crown's submission is that the word " falls " in the material phrase points in the direction of some external event which is going to happen and not in the direction of some artificial event brought about by the beneficiaries themselves; in other words, and putting it more shortly, the official attitude is to adhere to the trusts of the settlement. Section 7 (6), submitted Mr. Wilberforce, is only concerned with fixing a date. That date is the date of an event prescribed by the instrument, and a reversionary interest cannot " fall into possession " until that event has happened, even though the life tenant acquires it previously.

Mr. Pennycuick, for the plaintiff, on the other hand, pointed out some of the results which would necessarily follow if the official view were adopted. He said that supposing a life tenant bought a vested reversion from the reversioner's executors, had the settled fund transferred to him and died some 20 or 30 years later it would be virtually impossible at his death to ascertain of what the fund consisted and what its then value was. The fund, even if traceable (and assuming the Crown were entitled to trace it into other assets for the purpose of fixing the reversioner's estate with duty), might have been invested so skilfully by the tenant for life as to have doubled or trebled in value by the time of his death. On the other hand, the life tenant might have spent it all or become bankrupt. There could accordingly be no certainty as to, and no means of ascertaining, the amount of duty which the executors might have to pay or the time when they would have to pay it; and when the time for payment did fall due the amount of the duty might well exceed the price for which the executors had sold the reversion. Mr. Pennycuick then suggested that the official view, if adopted, would logically have to be applied to the converse case of the reversioner acquiring the life tenant's interest, and would lead to similarly extraordinary results. If, submitted Mr. Pennycuick, a life tenant surrenders his life interest to the reversioner, or the reversioner buys the life interest, and the life tenant survives the transaction by 20 years, it would be impossible to suggest that the reversion fell into possession on the death of the life tenant; for it would already have fallen into possession (in the sense of the property falling into the reversioner's possession) 20 years before. Yet such would be the effect of applying the official view.

Mr. Pennycuick contended that the difficulties of adopting the construction of the subsection which the commissioners have submitted, go most of the way towards showing that it cannot be right. The plaintiff's own case is that either Conrad Fry's reversion fell into possession when Mrs. Cooke-Hurle agreed to buy it or it will never fall into possession at all. Although the latter of these alternatives would be the most favourable to the plaintiff he only put it forward as subordinate to the first. As to this Mr. Pennycuick submitted that on signing the sale agreement Mrs. Cooke-Hurle became entitled, by virtue of the instrument which created the interest in expectancy, to the right to have possession of and dispose of the property in which the interest subsisted. His argument was, in summary, as follows: The enlargement of Mrs. Cooke-Hurle's enjoyment of the income of the fund into an absolute power of disposition can reasonably be said to constitute a "falling into possession" of the interest in expectancy. Before that enlargement took place it could be said that the reversion would fall into possession in futuro, but such could no longer be said after the life tenant had acquired it; it in fact fell into possession in the hands of the tenant for life, as the reversioner's assign, when she bought the interest, for thereupon the funds in which the interest had previously subsisted became transferable to her as her sole and absolute property. In the ordinary case, said Mr. Pennycuick, of property being settled on trust for A for life with remainder to B absolutely the settlement is at an end when the two interests coalesce; and there is no difference between that case and the present, where the tenant for life is past child-bearing and becomes entitled to have the trust fund handed over to her. The interests coalesce, the settlement ceases and so does the trust fund as such.

It seems to us that on the language of section 7 (6) neither the view of the Inland Revenue Commissioners nor that of the plaintiff can be said to be obviously wrong. The court, then, when faced with two possible constructions of legislative language, is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament. "In general," said Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners*,[3] "if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results." It does not seem to us that there is any satisfactory answer to such difficulties as those to which Mr. Pennycuick referred which are involved in the view that duty, in such cases as the present, does not become payable until the death of the tenant for life and that it is then exigible on the value of the whole settled fund as then existing. Such a view, moreover, would possibly run counter to the general principle that an executor should pay duty at the time when he has money in hand with which to pay it. This principle would be satisfactorily applied in such cases as the present (subject to the next question which falls to be considered) if the date of payment of the duty is the date of the sale agreement; for the reversioner's executor has the purchase price in hand with which to pay an immediately ascertainable duty. In our judgment, accordingly, the contention of the plaintiff, which is at least as acceptable on the mere question of construction as that of the Crown, is preferable in its results, and effect should therefore be given to it.

On that view of the matter the subordinate contention of the plaintiff that no duty is payable at all does not succeed; and beyond observing that it would be somewhat startling if payment of duty could be avoided altogether by the simple expedient of a life tenant purchasing a deceased reversioner's interest in expectancy from executors who had exercised the option conferred by section 7 (6), we need say no more about it.

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[3] [1953] A.C. 267, 281; [1953] 1 All E.R. 418.

On the footing, then, that Conrad Fry's interest in expectancy fell into possession when Mrs. Cooke-Hurle agreed to buy it, the next question that arises is as to the assessment of the duty which became payable by his executor, the plaintiff. The Crown contends that duty became payable upon the value of the whole fund. The plaintiff submits that, for purposes of duty, the interest should be taken at its then value as a reversion and that duty is only exigible in respect of that value. It was decided in *In re Eyre*,[4] and is now the established practice, that where under section 7 (6) of the Act an executor of a deceased reversioner has exercised the option thereby given and deferred the payment in respect of the interest in expectancy until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has fallen into possession, and not merely its value on the death of the deceased. The Crown says that the plaintiff cannot have it both ways and that if he succeeds in establishing that Conrad Fry's interest in expectancy fell into possession when Mrs. Cooke-Hurle agreed to buy it then he must take the consequences and one of such consequences is that the principle of *In re Eyre* [4] applies. Mr. Wilberforce submitted that as the parties chose to accelerate the falling into possession of Conrad Fry's interest they must abide by the results and the executor must pay duty on the footing that the whole fund did in fact fall into possession in the hands of Mrs. Cooke-Hurle, as Conrad Fry's assign; and that the assumption that her life interest still continued to exist cannot co-exist with the assumption that the reversionary interest had fallen into her possession. Mr. Stamp, in supporting Mr. Wilberforce's submission, submitted that a vested reversionary interest ripens sooner or later into the right to possession of the property in which the interest has been created, and the reversioner's executor is entitled to postpone payment of duty until he (or his assign) has acquired such possession; that it is irrelevant how possession is acquired or if it is acquired prematurely, for example by surrender of the life tenant's interest; and that in the present case Mrs. Cooke-Hurle, as assign of the reversioner, did get possession of the property, albeit prematurely. The plaintiff, on the other hand, contends that what has to be valued, and that which attracts liability to duty, is the interest in expectancy at the moment of time when it fell into possession. At the life tenant's death, it is said, the value of the reversion is the value of the property itself, for no prior interest stands in its way; but that in the present case there were two interests which coalesced in Mrs. Cooke-Hurle's hands, namely, her life interest and the reversionary interest which she bought, and that the value of the property is not solely represented by the interest in expectancy but is the sum of that interest and the life interest. It was submitted that Mrs. Cooke-Hurle has not given up her life interest; that merger is a question of intention and the amount of duty payable could not depend on whether Mrs. Cooke-Hurle did or did not make a declaration against merger when she bought the reversionary interest.

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[4] [1907] 1 K.B. 331.

The case for the Crown on this point is certainly not without attraction and makes a logical appeal. Nevertheless, it could lead to unexpected consequences, some of which were pointed out by Mr. Pennycuick. He suggested by way of illustration the case of a young tenant for life of a fund worth £100,000, buying for £10,000 the interest of a deceased reversioner, whose executors had exercised the option conferred by section 7 (6). In such a case the executors, though receiving only £10,000, would be liable to duty on the full value of the fund, namely, £100,000. Mr. Wilberforce's answer to this was that the executors need not enter into such a transaction and must accept the consequences if they do. This is true; but they might find it necessary to sell the reversion and obviously the highest bidder for it would be the life tenant, for he is the only person on whose death no duty would become payable in respect of it. We cannot think that in Mr. Pennycuick's illustration the Crown's claim would be in accord with the intention of section 7 (6) of the Act. It seems to us that such a claim would be wholly inequitable and we would again refer to Lord Reid's observations in *Coutts & Co.* v. *Inland Revenue Commissioners*,[5] already cited. In our opinion that which became subject to duty was that which Mrs. Cooke-Hurle bought, namely, the interest in expectancy; and it would be quite wrong to say that for the purposes of valuing that interest Mrs. Cooke-Hurle's pre-existing right to enjoy the income of the fund for the rest of her life should be disregarded. That which has to be valued, in our judgment, was that which she did not possess before and not the aggregate of that and her own life interest. As we say, we are conscious of the difficulty of reconciling the view that Conrad Fry's reversionary interest fell into possession when Mrs. Cooke-Hurle agreed to buy it with the further view that for the purpose of valuation it had to be treated as still being

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[5] [1953] A.C. 267, 281.

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an interest in remainder. As we have already indicated, however, such a transaction as that now under consideration was not apparently contemplated by the draftsman of the Act, who at all events failed to make any express provision for it. In the circumstances the court must do the best it can to apply the relevant legislation to particular, and apparently unforeseen, facts —as it did in 1956 in the case before this court of *Shrewsbury (Earl of)* v. *Inland Revenue Commissioners*.[6] In so applying section 7 (6) of the Act to the facts of the present case we are satisfied that the reconciliation to which we have referred can be achieved without subjecting the language of the subsection to an illicit strain, and should be achieved in the interests of justice.

In our judgment, accordingly, the appeal should be allowed.

Appeal allowed.

Solicitors: *Rider, Heaton, Meredith & Mills for Osborne, Ward, Vassall, Abbot & Co., Bristol; Solicitor of Inland Revenue.*

E. D.

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[6] [1956] T.R. 383.

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Mar. 7, 10, 11, 31.
Jenkins, Romer and Ormerod L.JJ.

KORES MANUFACTURING CO. LTD. *v.* KOLOK MANUFACTURING CO. LTD.

[1957 K. 358.]

Restraint of Trade—Employment—Agreement—Agreement between two companies that neither company would engage servants of the other —No provision giving power to determine contract—Duration—Reasonableness—Public policy—Validity.
Contract—Termination.

By letters dated August 30, 1934, and September 3, 1934, respectively, two companies agreed that neither company would, without the written consent of the other company, employ at any time any person who had been a servant of the other company during the period of five years previous to that time. The letters were silent as to the duration of the proposed agreement. Both companies were engaged in manufacturing similar products involving chemical processes, including exceedingly dirty work, in relation to which their respective technical employees might become possessed of confidential information and trade secrets. It was contemplated at the time of the agreement that their factories would be adjoining.

In an action commenced in 1957 by one of the companies against the other company claiming (1) a declaration that the agreement was a valid and subsisting agreement; (2) an injunction to restrain

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the defendants from employing a certain employee of the plaintiffs without the plaintiffs' consent in writing contrary to the agreement, and (3) an injunction to restrain the defendants from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs:—

Held, (1) that a contract in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public.

(2) That the mere fact that parties dealing on equal terms had entered into an agreement subjecting themselves to restraints of trade did not preclude the court, where the restraints were clearly unreasonable in the interests of the parties, from holding it bad on that ground.

Dictum of Viscount Haldane L.C. in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* [1914] A.C. 461, 471 considered.

(3) That, assuming that the agreement of 1934 was not impliedly terminable on reasonable notice, the restraint to which each party subjected itself was grossly in excess of what was adequate to protect that for which the other party required protection from the dangers against which protection was required; and that the agreement accordingly was unreasonable in the interests of the parties to it.

(4) That, even assuming that the agreement of 1934 was terminable by six months' notice on either side, it was still unreasonable in the interests of the parties; it spread its blanket over all employees irrespective of the nature and terms of their employment or the circumstances in which they left it.

(5) That, accordingly, the agreement failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and it was void and unenforceable.

Quaere. Whether the contract was impliedly terminable by reasonable notice.

Mineral Water Bottle Exchange and Trade Protection Society v. *Booth* (1887) 36 Ch.D. 465; *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688; 32 T.L.R. 297, and observations of Lord Birkenhead L.C. in *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.* [1919] A.C. 548, 562, 563; 35 T.L.R. 354 applied.

Per curiam. It is open to question whether an agreement directed to preventing employees of the parties from doing that which they could not, by individual covenants with their employers, validly bind themselves to do, should be accorded any greater validity than individual covenants by the employees themselves would possess.

Decision of Lloyd-Jacob J. [1957] 1 W.L.R. 1012; [1957] 3 All E.R. 158 affirmed.

APPEAL from Lloyd-Jacob J.

On August 30, 1934, a letter was written by Koreska (Gt. Britain) Ltd. (the name of which company was subsequently changed to Kores Manufacturing Co. Ltd.) to Kolok Manufacturing Co. Ltd. in the following terms: "In consideration of "your agreeing not without our written consent to, at any time, "employ any person who, during the then past five years, shall "have been a servant of ours, we undertake not, without your "written consent, to, at any time, employ any person who, during "the then past five years, shall have been a servant of yours."

In answer to that letter Kolok Manufacturing Co. Ltd. wrote to Kores Manufacturing Co. Ltd. the following letter, dated September 3, 1934: "We acknowledge receipt of your letter "of the 30th ultimo with reference to the employment of our "respective employees. We welcome this suggestion from which "it is understood that your company and our own will refrain "from engaging any person or persons who have been in the "employ of either firm during the previous period of 5 years. "As such an arrangement has our fullest support we hereby "agree to the terms of your letter of the above date. We are "sure that this arrangement will prove to be of mutual benefit, "and we shall be happy at any time to consider other proposals "which have for their objects similar safeguards."

In 1957, as a result of negotiations between Hugh Anthony O'Neill and Kolok Manufacturing Co. Ltd., relating to an application by him for a position on their staff, an agreement of July 1, 1957, was entered into between him and that company (he being at that time in the employment of Kores Manufacturing Co. Ltd.) under which Kolok Manufacturing Co. Ltd. appointed him as chief research chemist for two years and thereafter "unless and "until this agreement is determined by six months' prior notice "in writing given by either party to the other and so that such "notice in writing may be given so as to expire at or at any time "after the conclusion of the said period of two years."

During the negotiations, notice was given by O'Neill to Kores Manufacturing Co. of his wish to resign from the service of that company, and a dispute arose between the two companies as to whether, having regard to the letters of August 30, 1934, and September 3, 1934, Kolok Manufacturing Co. Ltd. were entitled to employ him.

A writ was, therefore, issued in May, 1957, by Kores Manufacturing Co. Ltd. claiming (1) a declaration that an agreement contained in the letters of August 30, 1934, and September 3, 1934, was a valid and subsisting agreement; (2) an injunction to restrain the defendants themselves or by their servants or agents from employing without the plaintiffs' consent in writing one

Hugh Anthony O'Neill contrary to the terms of the said agreement; (3) an injunction to restrain the defendants themselves or by their servants or agents from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs.

On motion made on May 21 and 24, 1957, for an injunction, an order was made that (it being agreed that the issues between the parties were those formulated in the schedule to the order and that those were the only issues between them in this action) the action should be set down forthwith for trial in Middlesex before a judge alone and that delivery of pleadings be dispensed with.

The schedule to the order was as follows:

"1. Whether (as the plaintiffs contend and the defendants "deny) the letters mentioned in the indorsement on the writ of "summons were of contractual effect.

"2. If the answer to (1) be 'yes'—whether (as the defendants "contend and the plaintiffs deny) such contract was and is void "as being in unreasonable restraint of trade and contrary to "public policy.

"3. If the answer to (2) be 'no'—whether (as the defendants "contend and the plaintiffs deny) such contract was terminated "by the tacit mutual consent of the plaintiffs and the defendants "in or about 1941 or alternatively in or about June, 1955.

"4. If the answer to (3) be 'no'—whether (as the defendants "contend and the plaintiffs deny) such contract contains an "implied term that the same is terminable by reasonable notice "given by either party to the other and that 6 months' notice "is reasonable."

Lloyd-Jacob J. held that the contract was void on the grounds that it was in restraint of trade and contrary to public policy, in that on the facts the period of five years was longer than was required to protect the parties' legitimate interests, imposed an unreasonable fetter on the freedom of a workman to offer his labour, and could in certain circumstances produce a public mischief. He held further that it was reasonable to imply a term that the contract should be terminable on 12 months' notice.

The plaintiffs appealed.

Charles Russell Q.C. and *Peter Oliver* for the plaintiffs. The agreement of 1934 was between employers, and not between employer and employee. In these circumstances, since the parties to it were dealing at arm's length and on equal terms on the question of subjecting themselves to reciprocal restraints upon their business activities, they are the best judges of what is reasonable in their interests: see *per* Viscount Haldane L.C. in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[1] and *per* Scrutton L.J. in *English Hop Growers* v. *Dering*[2] and *Palmolive Co. (of England) Ltd.* v. *Freedman.*[3] Further, this restraint is not injurious to the public interest. The only cases in which an agreement has been held invalid as contrary to the public interest although it was reasonable as between the parties were those in which the agreement had created a monopoly.

A " non-poaching " agreement such as the present can only be worked as a practical proposition in the form of a " blanket " agreement, that is, one which covers all employees of the respective parties. *It is necessary to make the period of disqualification as long as five years in order to gain protection from disclosure by an employee who might have knowledge of trade secrets or possess confidential information. It is conceded that if the agreement were to result in totally excluding an employee on leaving the employment from carrying on his normal trade it would be invalid as contrary to the public interest although it might be reasonable as between the parties to it. But the more unskilled the occupation of any particular employee the less likelihood there is of him suffering injury from the operation of the terms of the agreement.

[ROMER L.J. On the question of public policy, if this agreement is held to be reasonable as regards 99 per cent. of the employees but unreasonable in respect of one per cent., the agreement would go, would it not ?]

No question of severance would arise; the agreement must be construed as a whole. In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*[4] and *Joseph Evans & Co. Ltd.* v. *Heathcote*[5] the agreements were held to be invalid as being unreasonable as between the parties, but those cases are distinguishable from the present case. In *McEllistrim's* case[6] there was no real reciprocity, and in *Joseph Evans & Co. Ltd.* v. *Heathcote*[7] there was no time limit, and no power of withdrawal. Where an agreement is reasonable as between the parties a very heavy onus rests on the party seeking to prove that the agreement is contrary to public policy: *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[8]

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[1] [1914] A.C. 461, 470, 471.

[2] [1928] 2 K.B. 174, 180, 181.

[3] [1928] Ch. 264, 267 et seq.

[4] [1919] A.C. 548, 562, 563, 565, 566.

[5] [1918] 1 K.B. 418, 425, 429.

[6] [1919] A.C. 548.

[7] [1918] 1 K.B. 418.

[8] [1955] 1 W.L.R. 761.

To succeed, the defendants must show that this agreement creates a monopoly of employment in the particular trade and prevents a former employee from obtaining employment in the sphere in which he normally works. The effect of this agreement, however, is only to prevent employees of the respective parties from finding employment with the other; it does not and cannot prevent their employees from seeking employment with other concerns engaged in similar work, of which there are a number in the area in which the plaintiffs' and defendants' factories are situated. This case is plainly distinguishable on its facts from *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth*,[9] where 179 members of a trade protection society, who carried on business in various parts of Great Britain and elsewhere, entered into such an agreement. If the decision of Lloyd-Jacob J. be right, no effective "non-poaching" agreement can be entered into. [Reference was also made to *Attorney-General of Australia* v. *Adelaide Steamship Co.*[10]; *Connors Bros. Ltd.* v. *Connors*[11]; *Davies* v. *Thomas.*[12]]

F. W. Beney Q.C. and *R. S. Lazarus* for the defendants. In determining whether a contract containing a covenant in restraint of trade is reasonable as between the parties the court must first ascertain to what the restriction applies. Accordingly, the evidence must be directed to the circumstances existing at the time when the contract was made, and the court is entitled to draw inferences from the nature of those circumstances and from the terms of the agreement itself. An important factor is whether the restraint goes further than necessary for the desired restriction: see *per* Lord Parker of Waddington in *Herbert Morris Ltd.* v. *Saxelby*[13] and *per* Lord Birkenhead L.C. in *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*[14] There would appear to be no reason, except in the case of a few employees carrying on technical work, why there should be any bar of the kind imposed by this agreement. The real reason for making it was because the factories of the parties were adjoining and the object was to prevent employees going from one to the other in an endeavour to obtain higher wages. But that is no justification for placing all employees under the same ban.

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[9] (1887) 36 Ch.D. 465.

[10] [1913] A.C. 781.

[11] (1940) 57 T.L.R. 76; [1940] 4 All E.R. 179.

[12] [1920] 1 Ch. 217; [1920] 2 Ch. 189 (C.A.).

[13] [1916] 1 A.C. 688, 707.

[14] [1919] A.C. 548, 563.

The plaintiffs' approach to the question at issue is wrong. The right approach is first to ascertain the object to be served by the restriction, then to consider what restriction is reasonably necessary to achieve that object. The question then is whether the restriction actually imposed goes beyond what is reasonably necessary to achieve that object. If it does not, then it is regarded as an exception to the general principle that restraints of trade are unlawful. If it does go beyond what is reasonably necessary to achieve its object, then, unless there can be severance, the agreement is invalid. The factors which bear on the reasonable nature of the restriction as between the parties and on whether the agreement is contrary to the public interest may be common to both, e.g., a restriction placed upon a servant on leaving his master's employment: *Mason* v. *Provident Clothing and Supply Co. Ltd.*[15] Another example is afforded by the price restriction cases.

As to the so-called "blanket" nature of this agreement, it is not legitimate to group together all employees of the respective parties, from technical experts to cleaners, and place them all under a five-year ban. On the question of reasonableness, the evidence of the plaintiffs that they required the restriction for their protection is no evidence at all on the point; indeed, evidence that the plaintiffs or any other persons think it reasonably necessary is not admissible, because that is the very question the court has to determine. Further, it is for the plaintiffs to prove the sufficiency of their reasons, and that these were in fact weighty reasons; it is not enough for them to say that they think it reasonable and for the court to say that it seems not unreasonable without any facts being proved to show the reasonable necessity for the agreement: see *per* Farwell L.J. in *Leng (Sir W. C.) & Co. Ltd.* v. *Andrews.*[16]

It is true that this is an agreement between two employers and not one between master and servant, but the evil of it is that it has the same effect as if it were an agreement of the latter class because the employees are directly concerned in the implementation of its terms, and yet, until that event occurs, they may not even know of its existence. It places an unnecessarily wide ban on employees and, since its effect is as if it were an agreement between master and servant, it comes within the dictum of Lord Hanworth M.R. in *Palmolive Co. (of England) Ltd.* v. *Freedman*[17] that the courts have not allowed such an agreement "to be the

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[15] [1913] A.C. 724.

[16] [1909] 1 Ch. 763, 772.

[17] [1928] Ch. 264, 272.

"basis for unfair terms, throwing the servant out of employment "unnecessarily." *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth*[18] governs this case. The only difference between that case and the present is that there the agreement concerned a large number of employers while this agreement is between two employers only.

The proposition that where a restraint is reasonable as between the parties a heavy burden of proof lies on the party alleging that the agreement is contrary to public policy appears to be confined to the price maintenance and monopoly cases: see *per* Lord Parker of Waddington in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*[19] *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[20] is distinguishable; it was an exceptional case decided on its own special facts. [Reference was also made to *Mason* v. *Provident Clothing and Supply Co. Ltd.*[21] and *Attwood* v. *Lamont.*[22]]

Russell Q.C. in reply. The reaction of an agreement such as the present upon employees and ex-employees has nothing to do with the question whether the agreement is reasonable as between the parties to it. This comes within the branch of the law as to enforceability of contracts, and the particular question is whether it is reasonable as between the parties to restrict themselves as to whom they will employ. It is a separate question whether, if the agreement be held to be reasonable as between the parties, nevertheless it is injurious to the public because of its effect on the employees of the parties to the contract. As to reasonableness as between the parties, this is an exceptional case, since here there is complete equality and reciprocity. The contract is not invalid as being contrary to the public interest. The mere fact that certain persons cannot be considered eligible for employment by certain employers is not a matter which injuriously affects the public.

Cur. adv. vult.

March 31. JENKINS L.J. The judgment which I am about to deliver is the judgment of the court. [His Lordship stated the facts and continued:] It is not now disputed that the letters constituting the agreement of 1934 were of contractual effect, and that the agreement of 1934 was not at any time terminated by the tacit consent of the plaintiffs and the defendants. The first and third issues are thus eliminated. On the second issue, Lloyd-Jacob J., by whom the action was tried, held that the agreement of 1934 was void as being in unreasonable restraint of trade, and contrary to public policy; while on the fourth issue he held that the agreement of 1934 did contain an implied term making it terminable by reasonable notice by either party, but that the reasonable period to be allowed was 12 months, and not six months as claimed by the defendants. In conformity with his finding to the effect that the agreement of 1934 was void as being in unreasonable restraint of trade and contrary to public policy, the judge by his order dated July 26, 1957, dismissed the action with costs, and from that order the plaintiffs now appeal to this court.

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[18] 36 Ch.D. 465.

[19] [1913] A.C. 781, 796, 797.

[20] [1955] 1 W.L.R. 761.

[21] [1913] A.C. 724, 742, 745.

[22] [1920] 3 K.B. 571, 587.

As to the fourth issue—that is to say, the terminability of the agreement of 1934 by reasonable notice—both parties accept the view that it was so terminable, and that the length of notice to be regarded as reasonable must be assessed by reference to the circumstances existing at the time when any purported notice of determination is given or proposed. The plaintiffs further accept the judge's assessment of 12 months as the reasonable period of notice. On the other hand, the defendants, who have in fact given (or purported to give) six months' notice which expired on November 24, 1957, to terminate the agreement on that date, adhere to the contention raised by them on the fourth issue to the effect that the reasonable period of notice was and is no more than six months. Accordingly, the defendants served a respondents' notice of their intention to contend, in the event of the appeal being allowed, that the judge ought to have held six months' notice to be reasonable for the purpose of determining the agreement of 1934.

If the point was before us for decision, we would, as at present advised, have some difficulty in collecting from the terms of the 1934 agreement any implication of an intention that it should be terminable by reasonable notice. The agreement expressly imposes an obligation on either party not to employ at any time any person who, during the then past five years, shall have been a servant of the other, the then past five years clearly meaning the period of five years immediately preceding the date on which the question of engaging the person concerned comes under consideration. That surely means that any person at any time leaving the employment of one of the contracting parties is to be disqualified for the period of five years certain commencing on that date from entering the service of the other of them. We find it hard to reconcile the express application of the five years' period of disqualification to every employee leaving the service of either of the contracting parties with an implied condition for determination of the agreement by reasonable notice, for example, six or 12 months, which, as it seems to us, might well be regarded as inconsistent with its express terms.

Be that as it may, we must take the case as we find it, and accordingly, in considering the second issue—that is to say, the question whether the agreement of 1934 is void as being in unreasonable restraint of trade and contrary to public policy—we must assume that it was from its inception subject to an implied provision for its determination on reasonable notice. In doing so, however, we think it must be right to make the further assumption that the period to be regarded as reasonable notice in 1934 could be no shorter than the period of six or 12 months, as the case may be, to be regarded as reasonable in 1957.

In their notice of appeal, the plaintiffs relied on two grounds of appeal, the first being to the effect that the judge was wrong in holding that the agreement of 1934 was and is void as being in unreasonable restraint of trade and contrary to public policy; and the second being to the effect that the agreement of 1934 constituted a trade union as defined by section 16 of the Trade Union (Amendment) Act, 1876, and was a valid and subsisting agreement by reason of the provisions of the Trade Union Act, 1871. Mr. Beney, for the defendants, objected to this second ground as not being open to the plaintiffs on the issues as formulated in the schedule to the order of May 28, 1957, and as being a ground which was not relied on below. We upheld Mr. Beney's objection, and accordingly Mr. Russell, for the plaintiffs, confined his submissions to the first ground of appeal.

In the course of the argument on this issue, we were referred to many of the long array of decisions bearing upon the tests to be applied in determining whether a contract which is in restraint of trade, and therefore prima facie void, should nevertheless be upheld as a valid and enforceable contract. We do not propose to cite these authorities at any great length. The general principles to be applied are not in doubt; the difficulty lies in their application to the facts of particular cases.

As to the general principles, it will suffice to refer to the following well-known passages. In *Herbert Morris Ltd.* v. *Saxelby*[1] Lord Parker of Waddington, after referring[2] to the speech of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[3] and to *Attorney-General of Australia* v. *Adelaide Steamship Co.*,[4] continued as follows[5]: "It "will be observed that in Lord Macnaghten's opinion two con- "ditions must be fulfilled if the restraint is to be held valid. "First, it must be reasonable in the interests of the contracting "parties, and, secondly, it must be reasonable in the interests of "the public. In the case of each condition he lays down a test "of reasonableness. To be reasonable in the interests of the "parties the restraint must afford adequate protection to the "party in whose favour it is imposed; to be reasonable in the "interests of the public it must be in no way injurious to the "public. With regard to the former test, I think it clear that "what is meant is that for a restraint to be reasonable in the "interests of the parties it must afford *no more than* adequate "protection to the party in whose favour it is imposed." In a subsequent passage Lord Parker said[6]: "My Lords, it appears "to me that Lord Macnaghten's statement of the law requires "amplification in another respect. If the restraint is to secure "no more than 'adequate protection' to the party in whose "favour it is imposed, it becomes necessary to consider in each "particular case what it is for which and what it is against which "protection is required. Otherwise it would be impossible to pass "any opinion on the adequacy of the protection." He went on to draw the well-known distinction between a covenant against competition entered into by the vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject-matter of the sale provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in his enjoyment of the goodwill he has bought; and a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service. With respect to such restrictive covenants between master and servant Lord Parker said[7]: "The employer in such a case is not endeavouring "to protect what he has, but to gain a special advantage which "he could not otherwise secure. I cannot find any case in which "a covenant against competition by a servant or apprentice has, as "such, ever been upheld by the court. Wherever such covenants "have been upheld it has been on the ground, not that the

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[1] [1916] 1 A.C. 688; 32 T.L.R. 297.

[2] [1916] 1 A.C. 688, 706.

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[3] [1894] A.C. 535; 10 T.L.R. 636.

[4] [1913] A.C. 781; 29 T.L.R. 743.

[5] [1916] 1 A.C. 688, 707.

[6] Ibid. 708.

[7] [1916] 1 A.C. 688, 709.

"servant or apprentice would, by reason of his employment or "training, obtain the skill and knowledge necessary to equip him "as a possible competitor in the trade, but that he might obtain "such personal knowledge of and influence over the customers "of his employer, or such an acquaintance with his employer's "trade secrets as would enable him, if competition were allowed, "to take advantage of his employer's trade connexion or utilize "information confidentially obtained."

In *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[8] Viscount Haldane L.C. said: "My Lords, when the controversy is as to the validity of an agreement, say for service, by "which someone who has little opportunity of choice has pre-"cluded himself from earning his living by the exercise of his "calling after the period of service is over, the law looks jealously "at the bargain; but when the question is one of the validity of "a commercial agreement for regulating their trade relations, "entered into between two firms or companies, the law adopts a "somewhat different attitude—it still looks carefully to the "interest of the public, but it regards the parties as the best "judges of what is reasonable as between themselves. In the "present case I see no reason for doubting that in entering into "the contract on which this action was brought the respondents "were probably acting in their own best interest. It may well "be that such a contract was, in view of the powerful position of "the appellants, the respondents' best way of securing a market "and adequate prices. And if this be once conceded I find "nothing else in the detailed provisions of the contract excepting "machinery for working out the bargain. If the general object "was lawful, then these provisions were, in my opinion, free from "objection on the score of illegality. Nor do I find that the "public interest was necessarily or even probably injured." That case was concerned with a third type of restraint, not between master and servant, or between the vendor and purchaser of the goodwill of a business, but between traders for the purpose of regulating their trade to their mutual advantage. On Lord Parker's principle, that for which protection was required would, we suppose, be the trade of the parties, and that against which protection was sought would, we suppose, be injury to their trade through fluctuations in supplies and prices.

In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*[9] Lord Birkenhead L.C. said: "A contract

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[8] [1914] A.C. 461, 471.

[9] [1919] A.C. 548, 562, 563; 35 T.L.R. 354.

"which is in restraint of trade cannot be enforced unless (a) it is "reasonable as between the parties; (b) it is consistent with the "interests of the public. Your Lordships have recently laid down "rules as to where the onus lies in these matters. Such considera-"tions however do not arise in the present case. Every contract "therefore which is impeached as being in restraint of trade must "submit itself to the two standards indicated. Both still survive. "The observation made by the Judicial Committee in the "*Attorney-General of the Commonwealth of Australia* v. *Adelaide* "*Steamship Co.*[10]: 'Their Lordships are not aware of any case "'in which a restraint though reasonable in the interests of the "'parties has been held unenforceable because it involved some "'injury to the public'; is not, in my view, to be construed as if "both the tests indicated were not still in existence. It is indeed "not difficult to conceive of a case in which a contract in restraint "of trade might be adjusted to safeguard the reasonable interests "of the contracting parties, and yet might be opposed to the "public interest."

The onus of showing that a contract in restraint of trade is reasonable as between the parties lies upon the party alleging it to be such: see *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*,[11] *per* Lord Haldane. The onus of showing that a contract in restraint of trade is injurious to the public interest similarly lies on the party alleging it to be such; and "if once the "court is satisfied that the restraint is reasonable as between the "parties this onus will be no light one": see *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*,[12] *per* Lord Parker. "The question whether a restraint of trade is "reasonable either in the interest of the parties or in the interest "of the public is a question for the court, to be determined after "construing the contract and considering the circumstances "existing when it was made. It is really a question of public "policy and not a question of fact upon which evidence of the "actual or probable consequences, if the contract be carried into "effect, is admissible": see *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*,[13] *per* Lord Parker.

We should next endeavour to apply these general principles to the facts of the present case. The facts relevant to this issue are in small compass. Down to the date of the agreement of 1934 the plaintiffs had been carrying on their business in Britannia Street, City Road, Hoxton, London, N.1, while the defendants were carrying on their business at a factory in Tariff Road, Tottenham, London (about five miles away) where they have since remained. The plaintiffs were, however, at the date of the agreement of 1934 in the course of moving to a factory in Tottenham adjoining the defendants' factory. The plaintiffs' move to Tottenham was duly completed, and they remained at their Tottenham factory until 1955, when they moved to Harlow in Essex, perhaps 20 miles away from Tottenham. The proximity of the two factories at Tottenham would obviously make it easy for the staff of either party, of whatever grade, to pass from the employment of one into that of the other under the lure of higher wages or better working conditions. If no obstacle to such transfers was provided, the parties might well find themselves involved in a competition for staff to the detriment of both, and with undesirable effects on the discipline and stability of their respective complements of employees. Moreover, the business of manufacturing carbon paper, typewriter ribbons and kindred products in which the plaintiffs and defendants were both engaged involved chemical processes in relation to which their respective technical employees might, in the course of their employment, become possessed of confidential information and trade secrets. The unrestricted transferability of technical staff would thus entail the risk of trade secrets and confidential information gained in the service of one party being divulged to the other.

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[10] [1913] A.C. 781, 795.

[11] [1914] A.C. 461, 470.

[12] [1913] A.C. 781, 797.

[13] Ibid.

It should be added that the chemical processes included exceedingly dirty work for which it was not always easy to find staff, and any scarcity of employees prepared to undertake this dirty work would make competition for their services all the more likely, and accentuate its undesirable consequences.

At the date of the agreement of 1934 the plaintiffs had in their employment 100 persons, of whom 47 were unskilled manual workers, 14 were semi-skilled and skilled manual workers, 7 were technical staff, consisting of departmental managers and foremen, 12 were executive, administrative and sales staff, and 20 were clerical staff. Figures were also produced for 1955 and 1957 showing totals of 424 and 408 respectively, with 232 unskilled manual workers in 1955, and 221 in 1957.

At the date of the agreement of 1934 the defendants had in their employment 128 persons, but this total is classified by departments without showing separately the numbers of unskilled, semi-skilled and skilled manual workers. It is, however, legitimate to assume that a substantial proportion of the entire complement of employees consisted of unskilled manual workers and others who had no access to trade secrets or confidential information. In 1957 the total number of persons in the employment of the defendants had risen to 347, to which complement the same observation applies.

In 1957 there were throughout this country (in addition to the defendants) some 20 concerns manufacturing carbons and ribbons. About half of them are in or near London, and above five may be described as being within easy reach of Tottenham.

It is not clear from the evidence how far, if at all, the risk of trade secrets or confidential information gained by an employee in the service of one of the parties being divulged by that employee to the other party upon his passing into the service of the latter, as distinct from the more general risk of competition arising between the parties for the services of employees of any grade, was a matter to which the agreement of 1934 was consciously directed, but its terms are, of course, such as to extend to all employees of every grade, whether or not possessed of trade secrets or confidential information.

Such being the circumstances in which the agreement of 1934 was made, we must next, in accordance with Lord Parker's principle, ask and endeavour to answer the two questions, (1) What was it for which protection was required? and (2) What was it against which protection was required?

As to the first question, we take the answer to be that protection was required by both parties for (a) the adequacy and stability of their respective complements of employees and (b), as we are prepared to assume, trade secrets and confidential information of which any of their respective employees might have become, or might thereafter become, possessed in the course of their employment. As to the second question, we take the answer to be that the dangers against which protection was required were (a) the unimpeded secession of employees of any grade from the employment of either of the parties to that of the other of them in the competing concern "next door" under the inducement of higher wages or better working conditions, or merely for the sake of change, and (b) the divulging to their new employer by employees so seceding of any trade secrets or confidential information of which they might have become possessed in the course of their employment with the other party.

These being the matters for which protection was required, and the dangers against which they required protection, were the reciprocal restraints imposed by the agreement of 1934 reasonable as between the parties, or, in other words, did the restraint imposed on the defendants by the agreement of 1934 in the words of Lord Parker "afford no more than adequate protection" to the plaintiffs, and vice versa? We propose in the first instance to consider this question without regard to the effect of the assumption that the agreement of 1934 was impliedly terminable on reasonable notice.

Mr. Russell, for the plaintiffs, points out that the agreement of 1934 was an agreement between two employers, and not between employer and employee. He submits that where, as here, two employers, dealing at arm's length and on equal terms, choose to agree, for reasons which seem to them sufficient, to subject themselves to reciprocal restraints upon their business activities, then the parties themselves are to be regarded as the best judges of what is reasonable in their interests; see, for example, the passage already quoted from the speech of Lord Haldane L.C. in the *North Western Salt Co.'s* case.[14] It is only in exceptional cases, says Mr. Russell, that the court would be justified in overruling the parties' own judgment of what is reasonable where agreements of this type are concerned, and there is no sufficient ground for treating the present case as an exception from the general rule. He seeks to surmount the difficulty that under the agreement of 1934 the five-year period of disqualification applies to every employee of whatever grade, however long or however short his service with the plaintiffs or defendants may have been, and whether or not he has in the course of such service become possessed of trade secrets or confidential information, by an argument to the effect that the parties wished to give each other complete protection in all cases, and took five years as an adequate period of disqualification in the case of an employee of the highest grade, with perhaps most important trade secrets or confidential information in his possession, and for the sake of simplicity applied the same period to all employees without exception on the footing that it was too difficult to fix different periods for different categories of employees, and that all cases would be covered by what he termed a "blanket" if the period considered appropriate in the highest case was applied indiscriminately to all.

We cannot accept these arguments. It is for the court to judge whether an agreement in restraint of trade is reasonable in the interests of the parties. We agree that where traders dealing on equal terms have become parties to (for example) a scheme for maintaining prices or for central selling, and there is nothing in

[14] [1914] A.C. 461, 471.

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its provisions which is obviously unreasonable in the interests of the parties, the court will be slow to set it aside at the instance of a party who has freely agreed to it. But the mere fact that parties dealing on equal terms have entered into an agreement subjecting themselves to restraints of trade does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties. In the present case, the restraint reciprocally imposed on the plaintiffs and the defendants by the agreement of 1934 was such as to preclude the plaintiffs from employing at any time any person who had, during the then past five years, been a servant of the defendants, and vice versa.

To put the matter from the defendants' point of view, since they are asserting the invalidity of the agreement of 1934, they placed it out of their power to take into their service any person who had during the preceding five years been in the service of the plaintiffs for any period, however short, and in any capacity, however humble. The five-year ban was equally applicable to an unskilled manual labourer who had been for a single day in the employment of the plaintiffs, and to a chief chemist with many years' service. It would also, so far as we can see, be just as much applicable to a person whom the plaintiffs had dismissed from their service as to a person who had left their service of his own accord. There is no doubt that the real raison d'être of the agreement of 1934 was the proximity of the two factories owing to the plaintiffs' removal to Tottenham. Yet there was no provision limiting its duration to the period during which such proximity might continue. The agreement of 1934 is in terms applicable to all employees without exception, and without any distinction between employees possessed of trade secrets or confidential information and employees not so possessed, and not in the remotest degree likely to be so possessed. It is, therefore, quite obviously impossible to sever the agreement of 1934 in an attempt to uphold it as regards employees likely to be possessed of trade secrets or confidential information, even though bad as regards employees not in that category.

Stating the matter again from the defendants' point of view, though, of course, the converse applies equally to the plaintiffs, it appears to us that the restraint to which the defendants subjected themselves by the agreement of 1934 was grossly in excess of what was adequate to protect that for which the plaintiffs required protection from the dangers against which protection was required.

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Accordingly, for the reasons we have endeavoured to state, we are of opinion that (apart from the effect of the assumption that it was impliedly terminable by reasonable notice) the reciprocal restraints imposed by the agreement of 1934 were unreasonable in the interests of the parties to it, and that the agreement accordingly failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and was, therefore, void and unenforceable.

We would add this. It is true that the agreement of 1934 was between two employers, and not between employer and employee. Nevertheless, it was wholly and solely directed to preventing the employees of either contracting party, on ceasing to be employed by them, from entering the employment of the other contracting party. Apart from the question of trade secrets and confidential information, we have described the matter requiring protection as being the adequacy and stability of the plaintiffs' and defendants' respective complements of employees. That, no doubt, is an interest which employers are entitled to protect by all legitimate means, as by paying good wages and making their employment attractive. We have further described the danger against which that interest required protection as being the unimpeded secession of employees of either of the parties to that of the other of them under the inducement of higher wages or better working conditions. But an employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor. The danger of the adequacy and stability of his complement of employees being impaired through employees leaving his service and entering that of a rival is not a danger against which he is entitled to protect himself by exacting from his employees covenants that they will not, after leaving his service, enter the service of any competing concern. If in the present case the plaintiffs had taken a covenant from each of their employees that he would not enter the service of the defendants at any time during the five years next following the termination of his service with the plaintiffs, and the defendants had taken from their employees covenants restraining them in similar terms from entering the employment of the plaintiffs, we should have thought that (save possibly in very exceptional cases involving trade secrets, confidential information and the like) all such covenants would on the face of them be bad as involving a restraint of trade which was unreasonable as between the parties. Here the plaintiffs and the defendants have, as it seems to us, sought to do indirectly that which they could not do directly by reciprocal undertakings between themselves not to employ each other's former employees, entered into over the heads of their respective employees, and without their knowledge. It seems to us to be open to question whether an agreement such as that, directed to preventing employees of the parties from doing that which they could not by individual covenants with their respective employers validly bind themselves not to do, should be accorded any greater validity than individual covenants by the employees themselves would possess. We prefer, however, to leave that question open, and to found our conclusions as to the invalidity of the agreement of 1934 on the reasons given earlier in this judgment.

There appears to be no case in the books exactly comparable to this one. The nearest in point is, we think, *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth.*[15] In that case, to quote the headnote: " A society established for the " protection of a particular trade contained a rule that no member " should employ any traveller, carman, or outdoor employé who " had left the service of another member, without the consent in " writing of his late employer, till after the expiration of two " years." It was held by this court, affirming the decision of Chitty J., " that the rule was unreasonable, in restraint of trade, " and void." In the Court of Appeal it was argued for the appellants (inter alia) that the covenant did not go beyond what was reasonable for the mutual protection of the members. Cotton L.J. said[16]: " The 44th article of the association provides that ' No " ' member shall employ any traveller, carman, or outdoor " ' employé who has left the service of another member, without " ' the consent in writing of his late employer, until after the " ' expiration of two years from his leaving such service.' That " is perfectly general. It is not even limited in its application to " any particular employés who, from their position, might have " confidentially acquired any knowledge in their employment. It " is not confined to servants who, having been put in places of " confidence, have been long enough in the service to obtain any " information which they ought not to disclose, and which might " be used to the detriment of their employer. So that generally " if any outdoor employé were in the service of any member of " this society even for a week and then left he could not be " employed, if this covenant is a good one, by any other member

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[15] (1887) 36 Ch.D. 465.

[16] Ibid. 471.

"of the association. That of itself might be used most oppressively, and although in the present case (we have not heard the circumstances) it might be proper, if the covenant were aptly framed, to restrain the defendants from employing a particular individual so as to prejudice his late employer by using knowledge he had got confidentially, yet there is no restriction or limitation in this covenant at all."

Fry L.J. said[17]: "I am entirely of the same opinion. It appears to me that a covenant might have been framed which possibly might have been good, that is to say, that the masters might have contracted not to use in competition with one another knowledge confidentially obtained. It is said the object of this clause is to give effect to that intention. But it has gone far beyond it because it applies to every traveller, every carman, and every outdoor employé, whether they have or have not acquired such knowledge. It applies to those who may have acquired knowledge although they may have been employed in distant localities where their knowledge is of no avail. I think therefore the restraint of trade and of the liberty of Her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties."

That case turned to some extent on the widespread character of the society, whose members, numbering 179 (with a possibility of increase), covered a great part of the country, which made the restraint there in question very much more oppressive from the point of view of the employees than the restraint in the present case, concerning, as it does, only two manufacturers of carbons and ribbons out of a total of 20 or thereabouts; and the court appears to have regarded that degree of oppression as sufficing to make the agreement void as contrary to public policy. But the observations we have quoted also have a bearing on the question of reasonableness between the parties, and do, we think, afford some support for the conclusion to which we have come on that aspect of the present case: see also *Davies* v. *Thomas*.[18]

The view we have formed on the question of reasonableness between the parties makes it unnecessary for us to form any conclusion on the question of reasonableness in the public interest. Mr. Russell points out that the effect of the agreement here was only to prevent employees of the plaintiffs from finding employment with the defendants, and vice versa; that is to say, one factory only out of 20 was closed to employees of either.

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[17] 36 Ch.D. 465, 472.

[18] [1920] 1 Ch. 217; [1920] 2 Ch. 189; 36 T.L.R. 571 (C.A.).

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Moreover, he says that the presence within easy reach of Tottenham of five of the other factories makes it improbable that the living or travelling arrangements of any employee would be interfered with if, having left the employment of one of the parties, he found that he could not be accepted for employment with the other, and consequently had to go elsewhere. He says that to be contrary to the public interest an agreement such as the agreement of 1934 in the present case must create something in the nature of a monopoly of employment in the particular trade, as the agreement in the *Mineral Water Bottle* case[19] may be said to have done. We are not wholly convinced by this argument; but in view of our conclusion to the effect that the agreement of 1934 was unreasonable in the interests of the parties, we prefer to pass no opinion upon it.

As to the effect of the assumption that the agreement of 1934 was impliedly terminable by reasonable notice, we have already expressed our doubts as to the validity of that assumption. Accepting it, as we must, as well founded, we feel difficulty in forming any reasoned preference for 12 months rather than six months, or six months rather than 12 months, as the reasonable period. However, in the view that we take, the agreement of 1934 will still be unreasonable in the interests of the parties even if terminable by six months' notice on either side. In other words, to put this aspect of the case in the form most favourable to the plaintiffs, we think that even if six months had been substituted for five years as the period of disqualification provided for in the agreement of 1934, that agreement would still be unreasonable in the interests of the parties. It must be remembered that the agreement spreads its "blanket" (in Mr. Russell's phrase) without exception over all employees of either party, irrespective of the nature and terms of their employment, or the circumstances in which they left the service of the party by whom they were employed. In some cases and some circumstances six months might be reasonable; in others it might be wholly excessive, while in others again there might be no warrant for any period of disqualification at all.

For these reasons, we would dismiss this appeal.

Appeal dismissed.

Solicitors: *Hardman, Phillips & Mann; Richards, Butler & Co.*

J. A. G.

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[19] 36 Ch.D. 465.

CITY AND WESTMINSTER PROPERTIES (1934) LTD. *v.* MUDD.

1958
May 5, 6;
June 3, 4, 5;
July 2.

Harman J.

[1957 C. 1186.]

Contract—Construction—Deletion—Words in draft omitted in contract —Lease.

Contract—Construction—Extrinsic evidence—Lease—Covenant regarding user—Nature of premises—Knowledge of user.

Waiver—Landlord and tenant—Covenant—Breach—Covenant to use as business premises only.

Contract—Promise inducing—Lease—Covenant regarding user—Promise not to enforce.

In 1941 the defendant became the tenant of certain premises comprising a ground floor shop and basement described as a lock-up shop, for a term of three years during which he was allowed by the landlords (the plaintiffs) to sleep in an office behind the shop. By a lease dated April 5, 1944, the plaintiffs let the premises to the defendant for a term of three years from Lady Day, 1944, the defendant covenanting not to use the premises except as a shop for his business of an antique dealer. The defendant continued to carry on business there and to sleep behind the shop and during this period he fitted up the basement rooms for residential purposes. The plaintiffs knew that the defendant slept on the premises from time to time but did not know that the property was his residence. In January, 1947, the defendant asked for a new lease and in May the plaintiffs' solicitors sent a draft, clause 2 (9) of which contained a covenant by the lessee: "To "use the demised premises as and for showrooms, workrooms "and offices only and not to use exercise or carry on (certain "specified trades and businesses) . . . and not to permit or suffer "the demised premises or any part thereof to be used as a place for "lodging dwelling or sleeping." On October 27, 1947, the defendant's solicitors returned the draft, having struck out the last part of clause 2 (9), and enclosed a letter saying that the defendant had been sleeping on the premises for some time. There followed correspondence between the solicitors. Meanwhile the plaintiffs' agent told the defendant orally that if he signed the lease the plaintiffs would make no objection to his continuing to reside there; as a result of that the defendant was willing to complete. On February 10, 1948, the lease and counterpart were exchanged, the lease omitting the words which had been struck out from clause 2 (9) of the draft by the defendant's solicitors. After the execution of the lease the defendant continued to reside and carry on business on the premises. In May, 1956, the defendant asked for a new lease and the plaintiffs' managing director having visited the premises and learned that the defendant was living there wrote giving the defendant notice to quit.

In an action for forfeiture of the lease on the ground of breach of covenant, the defendant denied that he was in breach, and alleged, alternatively, that the plaintiffs had waived the covenant or, alternatively, were estopped from relying on it. He also counterclaimed for rectification of the lease and relief against forfeiture:—

Held, (1) that on the question of construction of the covenant it was not permissible for the court to look into the past history of the matter or to rely on the fact that the defendant had been living on the premises to the plaintiffs' knowledge; nor could the fact be called in aid that express words of prohibition as to residence had appeared in the draft but were not in the lease as executed, none of these matters being surrounding circumstances which could be called in aid to construe the language used.

Caffin v. *Aldridge* [1895] 2 Q.B. 648; 12 T.L.R. 27 distinguished; *Inglis* v. *Buttery* (1878) 3 App.Cas. 552 applied.

(2) That the nature of the property, however, was a matter to be taken into consideration, and the fact that these particular premises were not suitable for a dwelling-house, taken with the fact of a covenant to use them for showrooms, workrooms and offices only, clearly showed that the defendant was in breach of covenant in using the premises for residential purposes.

Levermore v. *Jobey* [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362; *Reg.* v. *Brighton and Area Rent Tribunal, ex parte Slaughter* [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423 considered.

(3) That the fact that the plaintiffs knew that the defendant was using the premises to sleep in and were prepared to allow that did not amount to a release by them of the covenant contained in the lease.

Lloyds Bank v. *Jones* [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5; sub nom. *Re Lower Onibury Farm, Onibury, Shropshire, Lloyds Bank* v. *Jones* [1955] 2 All E.R. 409 and *Wolfe* v. *Hogan* [1949] 2 K.B. 194; [1949] 1 All E.R. 570 considered.

(4) That the defendant, having signed the lease because of the promise of the plaintiffs' agent, was entitled to rely on that promise so long as he was in occupation of the shop and the action would be dismissed.

In re William Porter & Co. Ltd. [1937] 2 All E.R. 361 applied.

ACTION.

The plaintiffs in this action, City and Westminster Properties (1934) Ltd., claimed forfeiture of a lease granted to the defendant of premises known as No. 4, New Cavendish Street, W.1, on the ground of breach of covenant.

The following facts are taken from the judgment of Harman J.: The demised property consists of a ground floor and basement forming part of a block of residential flats having four storeys above the ground floor which consisted of four shops described as lock-up shops; the basements go with the shops. The defendant began his connexion with the property in 1941, when he took over the shop and basement for a term of three years. No written agreement was produced covering this period, during which it was admitted that he was allowed to sleep in the ground floor back room behind the shop. This was a wartime arrangement. The defendant was engaged in civil defence activities and it was thought a useful protection against incendiaries that he should be on the property at night. His Lordship found that no inference ought to arise from this. During this period the defendant fitted up a room in the basement in an elaborate style as a sitting room. On April 5, 1944, a lease was granted by the plaintiffs to the defendant by a document under seal whereby the landlords let " the shop on the ground floor and " the basement floor all as now in his occupation " of No. 4, New Cavendish Street, for a term of three years from Lady Day, 1944, at an annual rent of £170 payable monthly. There were covenants by the lessee, who was described in the lease as an antique dealer, " not to use or permit the use of the said premises except as the " shop of the lessee for his business as hereinbefore described "; also not to do or suffer to be done anything which might render the premises liable to be assessed as a dwelling-house. The defendant continued to carry on his business of an antique dealer in the ground floor shop and to sleep in an office behind the shop where he had a divan bed covered in the day with a velvet counterpane. During the term of this lease the defendant fitted up another room in the basement as a dining room. Both the basement rooms had an appearance consistent with being showrooms for antique furniture, but the defendant alleged that in fact this furniture was not for sale and that he did not take customers down to the basement. He said in evidence that he used these rooms to live in and to entertain his friends. He had an electric cooker in the front area of the basement and a wash basin with an Ascot water heater in a lavatory at the back. He said that he made no secret of the fact that he was living on the premises and that the plaintiffs, particularly through their property manager, one Jones, were well aware of the fact. His Lordship found that the plaintiffs were aware that the defendant from time to time slept on the ground floor, but he was not satisfied on the evidence that they knew that the property was the defendant's principal or only residence or that he used the basement rooms as his home.

In January, 1947, the defendant asked for a new lease and was offered a further lease for seven years from Lady Day, 1947. Negotiations proceeded in a dilatory fashion. A draft lease was sent to the defendant in May, 1947. He continued to occupy the property as before and took no step in the matter during the summer beyond agreeing the repairing terms and the new rent. In August, 1947, Jones telephoned to the defendant, who gave some explanation of the delay and instructed his solicitors, who on October 17, 1947, returned the draft revised in red ink. By this document, as it then stood, the plaintiffs were expressed to demise to the defendant the ground floor shop and basement for the term of 14 years from Lady Day, 1947, at an annual rent rising to £325 in the last seven years of the term, payable quarterly on the usual quarter days, together with fire insurance premiums. The lessee's covenants included covenants to repair and paint, and clause 2 (9) was in the following terms: "To use "the demised premises as and for showrooms, workrooms and "offices only and not to use exercise or carry on or permit or "suffer to be used exercised or carried on in or upon the said "premises or any part thereof the trades or businesses of"—and then followed a long list of prohibited trades and businesses. The clause ended in this way: "and not to permit or suffer "the demised premises or any part thereof to be used as "a place for lodging dwelling or sleeping." There was a proviso for re-entry by the landlords upon breach of any of the lessee's covenants. At the time when the red ink revisions were made, the defendant's solicitors did not know that he had been residing on the property and intended to continue so to do. On October 27, 1947, the plaintiffs' solicitors returned the draft with various amendments in yellow ink not here relevant. The draft in this condition was submitted by the defendant's solicitors to him, when he pointed out to them the words at the end of clause 2 (9), and took objection to them on the ground that he was in fact residing on the premises and intended so to continue. On October 29 they returned the draft with the words at the end of clause 2 (9) struck out and a sidenote in green ink in these terms: "The lessee has in fact been residing at the premises for "some years and has spent a large sum of money on decora"tions." The covering letter was in these terms: "We have "your letter returning draft lease revised, and our client accepts "your revisions [the yellow ink revisions]. We are informed "by our client that he has been living at the premises for some "considerable time and has spent a large sum of money on "decorating the rooms he occupies. Our client lives entirely "alone and he points out that unless he resides at the premises "he cannot obtain any burglary insurance of his very valuable "stock of antiques. We have seen the premises the lessee occupies for his own use and they are most expensively decorated "and furnished and we consider, therefore, that your clients are "not in any way prejudiced by our client's user. We have, "therefore, amended clause 2 (9) in green ink and shall be glad "to know that your clients will accept this. If so, perhaps you "will let us have engrossment for execution."

On this the plaintiffs' solicitors consulted their clients and advised them that permission to the defendant to reside on the premises might bring the shop and basement within the Rent Restrictions Acts. Accordingly, on November 28 the plaintiffs' solicitors wrote the following letter to the defendant's solicitors: "With reference to your letter of the 29th of last month and "the enclosure mentioned as accompanying it, we have now "received our clients' instructions that notwithstanding such "user to which these premises may have been put in the past, "they must insist upon the retention of the restriction in clause "2 (9) which you have deleted in green ink. On hearing from "you that this is agreed, we will proceed to engross the lease "and counterpart. We cannot agree with your contention that "our clients are in no way prejudiced by the premises being used "for residential purposes; such user would probably be construed "as bringing the letting within the provisions of the Rent Restrictions Acts." The draft was not returned to the plaintiffs' solicitors, but the defendant's solicitors replied as follows on December 1: "We have your letter of the 28th of last month "and note what you say, but our client will, of course, require "an assurance that upon completion of the lease your clients "will take no steps to prevent his using the premises for residential purposes. As the primary letting is for business use, "we do not think the letting would be brought within the provisions of the Rent Restrictions Acts, but our client cannot run "the risk of being stopped from residing on the premises while "he is the lessee." There followed a gap in the correspondence until December 31. During this interval, according to the defendant's evidence, he telephoned to Jones and told him that he would not sign the lease with a clause about not sleeping there. He added that he asked Jones to have a clause inserted stating expressly that he could sleep there, but that Jones replied that this was impossible because it was against the terms of the head-lease. This was in fact untrue, but his Lordship found that it was clear that Jones believed his own statement. According to the defendant, Jones added that the plaintiffs would make no objection to his continuing to reside there if he would sign the lease. Jones, who had at the time of these proceedings left the employment of the plaintiffs and was only called at an adjourned hearing, stated that he had no recollection of this conversation. He admitted in cross-examination that the plaintiffs must have known that the defendant was living on the premises and said that the plaintiffs' object was to avoid the mischief of the Rent Restrictions Acts. He added that on paper his attitude was "business premises only," but that he was less emphatic when dealing with the defendant personally. On December 31 the defendant's solicitors wrote to the plaintiffs' solicitors as follows: "We have now taken our client's instructions on your letter to "us of November 28 and we understand that he himself has "spoken to your clients with reference to this. Our client is "now willing to complete the lease and we shall be glad to "receive the counterpart for execution."

The lease and counterpart were exchanged and were dated February 10, 1948. Clause 2 (9) omitted the words at the end expressly excluding lodging, dwelling or sleeping. Byford, the plaintiffs' solicitor, stated in evidence that he read the letter of December 31 as meaning that the defendant had given way and that the words at the end of clause 2 (9) were omitted by inadvertence in his office. In his Lordship's view doubt was thrown on this statement by one Turner, then the defendant's solicitor, who deposed to a conversation on the telephone with Byford. This was said to have been held just after the Christmas holiday and to have been to the effect that the defendant had spoken to his landlords and was "quite happy he would not be disturbed" and had nothing to worry about. He said in evidence that Byford said that the plaintiffs' main concern was that neighbouring tenants might complain and that it was agreed that the words struck out in green be left out and that the less said about living on the premises the better. Byford denied all recollection of this conversation and said that he took the letter of December 31 to mean that the defendant had given way. His Lordship accepted Turner's evidence on the point.

After the execution of this lease the defendant carried on business as before and continued to live on the property. In the spring of 1950 war damage repairs were done by the plaintiffs and in connexion with these Jones and one Northover came down and inspected the basement, and a little later one Kingscote, a director of the plaintiffs, also came down and inspected damage done. According to the defendant's evidence, he made it clear to them that he was living on the premises. Jones for his part said that this was far from clear to him, though he recognized that the defendant was sleeping there from time to time. In June, 1953, the defendant applied for leave to instal a bath in the basement. This was promptly refused in a letter of June 18, 1953: " We understand from our surveyors who called upon you " yesterday that you are contemplating installing a bath in the " basement at these premises but we regret that we are unable " to agree to this matter proceeding. These premises are let solely " for business purposes, as clearly defined in the lease under " which they are held dated February 10, 1948, and any use of " the premises for residential purposes can in no way be allowed. " Our head-lease expressly excludes the use for living accommo- " dation, the premises are scheduled for business purposes and " shop only and any alteration in such use seriously prejudices our " position with our ground landlords. We shall be glad, there- " fore, to hear from you that any proposals that you have in " mind in this direction will not be proceeded with." In May, 1956, the defendant applied to the plaintiffs for a further 21 years' lease of the property and in connexion with this there were considerable negotiations, in the course of which one Nixon, then the managing director of the plaintiffs, interviewed the defendant on the property on October 1. In the course of the interview Nixon noticed signs of residence upon the property and asked the defendant if he was living there, to which the defendant replied he was and why should not he. As a result a letter was written by Nixon on the plaintiffs' behalf which contained the following passage: " It was noticed that you are using the " premises for residential purposes, which is not in accordance " with the terms of your lease as this particularly specifies that " the premises are to be used for business purposes. We therefore " request that you cease to live in the premises forthwith and " give your assurance that they will not be used for this purpose " at any time in the future. This was made perfectly clear in " our letter to you of June 18, 1953." As a result, a notice was served and plaintiffs issued a writ.

The statement of claim as drawn alleged as a breach that the defendant was residing on the premises. This the defendant denied, but admitted that he was sleeping there and always had done in order to guard the valuable stock of his business which he did not insure. He also alleged a release or waiver by the plaintiffs by reason of their knowledge prior to and during the currency of the lease of his said user, that is to say sleeping with the object of protecting the stock, and relied on acquiescence. When the action came on, the defendant desired in aid of his plea on the construction of the lease to rely on the plaintiffs' state of knowledge at the time when it was made. He also wished to rely on the doctrine of promissory estoppel. The case was adjourned to enable the pleadings to be amended. At the adjourned hearing, the defendant added the facts which he alleged amounted to estoppel and also claimed rectification by the insertion of these words in the covenant as to user: "provided "that nothing herein shall prohibit the said Dixon Horace Mudd "from personally residing in the demised premises." The defendant, however, omitted to add a prayer in his counterclaim to that effect. In their reply, the plaintiffs denied the plea of rectification, alleging that the intention was to complete with the omitted words at the end of clause 2 (9) expressly prohibiting residence. The plaintiffs further pleaded that if they had allowed the defendant to reside on the premises, this was only a licence which they could recall at will.

John Bradburn for the plaintiffs. On the question of construction, the words of the covenant in clause 2 (9) of the lease as it stands, "to use the demised premises as and for showrooms, "workrooms and offices only," mean that the premises are to be used for no other purpose and, accordingly, prohibit residence: *Creery* v. *Summersell and Flowerdew & Co. Ltd.*,[1] *Hazell, Watson & Viney Ltd.* v. *Malvermi*[2] and *Court* v. *Robinson*.[3] In the absence of any issue of rectification, which was not originally raised in the pleadings, evidence of the original form of the covenant and of its alteration in the course of negotiations for the lease is not admissible: *Creery* v. *Summersell*.[4] On the issue of rectification as raised by amendment of the defendant's counterclaim, the defendant's own evidence is to the effect that his agreement with the plaintiffs' agent was that no express provision allowing residence should appear in the lease. Rectification, accordingly, falls to the ground for lack of the necessary common intention that such a provision should be inserted.

On the defendant's first alternative plea of release or waiver, residence in breach of the covenant was a continuing breach and was waived, if it was waived at all, by acceptance of rent only down to the end of each period in respect of which rent was paid and accepted. To succeed on this issue the defendant must go further and show acceptance of rent with such full knowledge of the circumstances and over such a period as to raise the inference of affirmative consent to the changed user, amounting to a release of the covenant: *Wolfe* v. *Hogan*,[5] *per* Evershed and Denning L.JJ.[6] In this instance he fails for two reasons, (1) the period is not long enough, there being no reported case in which a period of less than 20 years has been held sufficient, and (2) the evidence does not show sufficiently full knowledge on the part of the plaintiffs of the defendant's residence.

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[1] [1949] Ch. 751.

[2] [1953] 2 All E.R. 58.

[3] [1951] 2 K.B. 60; [1951] 1 All E.R. 209.

[4] [1949] Ch. 751.

On the defendant's second alternative plea (introduced by amendment), that the plaintiffs were not entitled to enforce, or were estopped from enforcing the covenant, this is presumably an attempt to rely on the doctrine of what is called in Halsbury's Laws of England, 3rd ed., vol. XV, p. 175, "promissory "estoppel." That doctrine is confined to cases in which, when parties are already in legal relationship, one gives to the other an assurance, which is acted upon, that his full legal rights will not be enforced: see the passage quoted in Halsbury, 3rd ed., vol. XV, p. 175, note (*i*), from *Hughes* v. *Metropolitan Railway Co.*[7] Here the assurance alleged preceded the creation of the legal relationship embodied in the lease. Even if the doctrine is applicable here, the defendant's evidence of the "assurance" by the plaintiffs' agent ought not to be accepted. The defendant now maintains that the continuance of his ability to reside at the premises was at all times vital to him, yet the alleged assurance was never mentioned in his solicitors' letter of December 31, 1947, or by way of reply to the plaintiffs' letter of June 18, 1953, to Nixon, the plaintiffs' managing director, on October 1, 1956, or in the solicitors' correspondence before action was brought, or in the defence as originally pleaded. It was mentioned for the first time only after the hearing of the action had begun. The onus is heavily on the defendant and has not been discharged.

Even if the defendant's evidence is accepted, he goes no further than that the plaintiffs' agent "would raise no objection "whatever to his continuing to reside." This amounts only to a licence which is not either expressly or impliedly made irrevocable for the term of the lease. Even under the doctrine of promissory estoppel as developed in *Central London Property Trust Ltd.*

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[5] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[6] [1949] 2 K.B. 194, 199, 200, 203, 205, 206.

[7] (1877) 2 App.Cas. 439.

v. *High Trees House Ltd.*,[8] there is a reversion to the parties' strict legal rights when the period of concession runs out. Here permission to reside was withdrawn and reasonable notice given before the plaintiffs sought to enforce the observance of the covenant.

As to the counterclaim for relief against forfeiture under section 146 of the Law of Property Act, 1925, the plaintiff company would not object to relief being given on the terms that the defendant ceased to reside.

David Kemp and *A. P. Graham-Dixon* for the defendant. On its true construction the covenant in the lease does not prevent residential use being made of part of the premises provided that the shop is used for "showrooms, workrooms and "offices." It is a guiding rule in construing a covenant of this sort, which may work a forfeiture, that it must always be construed strictly against the lessor: see *per* Harman J. in *Creery* v. *Summersell and Flowerdew & Co. Ltd.*[9] Alternatively, even if residential use of part of the premises would otherwise be barred, nevertheless, the residential use made in this particular case was due to the exigencies of an antique dealer's business. It was necessary or at least desirable that the defendant should sleep on the premises in order to safeguard his stock. In *Reg.* v. *Brighton and Area Rent Tribunal*[10] the court had to construe the relevant covenant in order to see whether it barred the use of *any part* of the premises as a dwelling-house. It is true that the subject-matter of the lease in that case was different from the subject-matter here in that it was a ground floor shop let with a self-contained flat above, and that this was a "surrounding "circumstance" that influenced the court, but the court had no difficulty in construing the words of the relevant covenant which were much stricter and wider than the words in the present case. In *Levermore* v. *Jobey*[11] the Court of Appeal applied the same test as in the *Brighton* case,[12] that is, did the covenant bar the use of *any* part of the premises as a dwelling-house.

To construe the covenant one must look at the surrounding circumstances. In the present case the material surrounding circumstances are: (1) The defendant had lived on the premises for the previous six years, and the landlords knew it. (2) The defendant had adapted part of the demised premises for residential use, and the landlords knew it. (3) The plaintiffs' solicitors had said in a letter that he, the defendant, must be allowed to live on the premises. Evidence of the draft lease should be looked at to assist in construction: *Caffin* v. *Aldridge*[13]; *Inglis* v. *Buttery*[14]; *The Anastasia.*[15]

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[8] [1947] K.B. 130; [1956] 1 All E.R. 256.

[9] [1949] Ch. 751, 759.

[10] [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423.

[11] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[12] [1954] 1 Q.B. 446.

On the question of release or waiver of the covenant by the landlords such release need not be express. If the lessor is aware of a continuing breach, and acquiesces in it for a long period, it will be presumed either that he has released it or granted a licence for the user: see Halsbury's Laws of England, 2nd ed., vol. 20, p. 231. [Reference was also made to Hill and Redman's Landlord and Tenant, 10th ed., p. 212; *Gibson* v. *Doeg*[16]; *Gibbon* v. *Payne*[17]; *Hepworth* v. *Pickles*[18]; *Wolfe* v. *Hogan*[19] and *Lloyds Bank* v. *Jones.*[20]]

The defendant relied on the promise of the plaintiffs' agent that if he executed the lease he would be allowed to go on residing on the premises, and the plaintiffs are estopped by reason of that promise because the defendant in executing the lease acted to his detriment: see *In re William Porter & Co. Ltd.*[21]; *Hughes* v. *Metropolitan Railway Co. Ltd.*[22]; *Hopgood* v. *Brown*[23]; *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[24] and *Combe* v. *Combe.*[25]

John Bradburn in reply. The *Caffin* v. *Aldridge*[26] line of cases, if good law, are to be confined (a) to instances where selected words are apparent on the face of the document, and (b) to commercial documents. The principle as stated in *Combe* v. *Combe*[27] has been criticized as too wide: *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*,[28] *per* Lord Simonds; and *Lyle-Meller* v. *A. Lewis & Co. (Westminster) Ltd.*[29] supports the view that even if the plaintiff company was precluded from enforcing the covenant so long as the permission to reside lasted, now that permission has been withdrawn it can enforce the covenant according to its terms. *Reg.* v. *Brighton*

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[13] [1895] 2 Q.B. 648; 12 T.L.R. 27.

[14] (1878) 3 App.Cas. 552.

[15] (1933) 45 Ll.L.Rep. 6, 7.

[16] (1858) 2 H. & N. 615, 623.

[17] (1915) 22 T.L.R. 54.

[18] [1900] 1 Ch. 108.

[19] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[20] [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5.

[21] [1937] 2 All E.R. 361.

[22] 2 App.Cas. 439.

[23] [1955] 1 W.L.R. 213, 223–224, 228–229, 230.

[24] [1947] K.B. 130; [1956] 1 All E.R. 256.

[25] [1951] 2 K.B. 215, 219–220, 225.

[26] [1895] 2 Q.B. 648.

[27] [1951] 2 K.B. 215.

[28] [1955] 1 W.L.R. 761, 767.

[29] [1956] 1 W.L.R. 29.

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and Area Rent Tribunal [30] and *Levermore* v. *Jobey* [31] are distinguishable. Neither case makes past history or previous user a "surrounding circumstance" at which the court can look in construing the covenant. It is conceded that the nature of the premises is such a circumstance, but here the premises are in no sense a dwelling-house; they are a lock-up shop and nothing more. On waiver or release, the period of 20 years is material and was the basis of the decision in *Gibson* v. *Doeg*.[32] Further, in that case the landlord's knowledge of the breach of covenant was admitted; here sufficient knowledge is not proved.

Cur. adv. vult.

July 2. Harman J. read the following judgment in which he stated the facts and continued: The first question to be answered is that of construction. The words on which the plaintiffs rely are those at the beginning of clause 2 (9), "to use the demised "premises as and for showrooms workrooms and offices only," and it is argued that the plain meaning of these words is that no other use is to be made of the premises. It is said that this interpretation is affirmed by the rest of the clause which further cuts down the user by prohibiting a large number of trades or businesses. In my judgment, on the question of construction it is not permissible to look into the past history of the matter, nor to rely on the fact that the defendant had been living on the premises to the knowledge of the plaintiffs, nor even that he intended to continue to do so; nor, in my judgment, can the fact be called in aid that express words of prohibition as to residence had appeared in the draft and did not appear in the lease as executed. In commercial cases where printed forms are used, attention has been paid to words struck out. This method of construction had, I believe, the great authority of Scrutton L.J. There is an instance of it in *Caffin* v. *Aldridge*.[1] That was a commercial cause where the court had to construe the word "cargo," and they could see on the face of the document that before the word "cargo" there had been the words "full and "complete" and these had been struck through. Lord Esher M.R. said this [2]: "In order to see what it meant, one must look "at the rest of the document. We find that the words 'full and "'complete,' which were originally in the printed form, had been

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[30] [1954] 1 Q.B. 446.

[31] [1956] 1 W.L.R. 697.

[32] 2 H. & N. 623.

[1] [1895] 2 Q.B. 648, 650.

[2] Ibid.

"struck out." Lopes L.J. also said[3]: "The words 'full and "'complete' were erased; and that could only, I think, have "been done for the purpose of showing that such was not the "intention." Kay L.J. did not allude to that matter. Whether this be legitimate, I take leave to doubt: for example in *Inglis* v. *Buttery*,[4] again a commercial case, the House of Lords held that neither letters of the parties before the contract was signed nor deleted words in the contract could be considered for the purpose of interpreting the intention of the parties. Lord Hatherley L.C. said this[5]: "Nor can I think, and I believe your "Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the "agreement with a line drawn through them, and which are "expressly, by the intention of all the parties to the agreement, "deleted, that is to say, done away with, and wholly abolished. "It is not legitimate to read them and to use them as bearing "upon the meaning of that which has become the real contract "between the parties, namely, the final arrangement of the document which we must now proceed to construe." At any rate, in my judgment, that method of construction must be confined to commercial cases where the words struck out appear on the face of the signed document and cannot be extended to looking at words which appear in a draft.

All these matters which I have mentioned are not, in my judgment, surrounding circumstances which can be called in aid to construe the language used. On the other hand, the nature of the property (that is to say, whether it was obviously a dwelling-house or adapted to be used as such) are matters to be taken into consideration. This is shown by the recent case of *Levermore* v. *Jobey*,[6] where at the end of the headnote I find these words: "*Per curiam.* In construing a lease for the purpose "of deciding whether it effects a letting of a dwelling-house the "court is not precluded from looking at the subject-matter of the "lease, namely, the property let, to ascertain whether it is or is "not adapted for living purposes." Jenkins L.J. says this[7]: "The first thing to be done, therefore, in the present case is to "look at the terms of the lease. For the purpose of construing "the lease . . . it is permissible for the court, and indeed "obligatory on it, to pay regard to the surrounding circumstances "with reference to which the lease was entered into, and in

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[3] [1895] 2 Q.B. 648, 650.

[4] (1878) 3 App.Cas. 552.

[5] Ibid. 558.

[6] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[7] [1956] 1 W.L.R. 697, 700.

"particular to look at the nature of the subject-matter of the "letting."

My attention was called not only to this case but to another in which covenants not unlike those before me have recently been construed by the court. The earlier case is *Reg.* v. *Brighton and Area Rent Tribunal*.[8] That was a case under the Rent Restrictions Acts, the question being whether a shop with a self-contained flat over it ought to be classed as a dwelling-house. The covenant in question was that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer, and it was held that so long as he carried on a greengrocer's business there he was not in breach of covenant, though he lived on the property. Lord Goddard C.J. in a reserved judgment, after quoting the covenant, said[9]: "The rule with regard to the construction of "such a covenant is conveniently stated in Foa's Landlord and "Tenant, 7th ed., p. 111, and as we think that the passage "accurately states the law we will quote it instead of setting out "the various cases which deal with this point: 'A covenant, like "'any other contract, is to be construed according to the intent "'of the parties as expressed by their own words, and by regard "'to the whole of the instrument, and the surrounding circum- "'stances of the case, it being also a rule that if the words be "'doubtful, that construction is to be taken which is most strong "'against the covenantor.' Bearing that in mind, it is in our "opinion impossible to construe this covenant so as to prohibit "the tenant from living on the premises. Provided that the "tenant carries on a greengrocer's business it would in our "opinion be impossible, and, indeed, absurd to say that he was "in breach of his covenant because he lived on the premises. So "to hold would mean that the whole of the upper part was "sterilized, at least to the extent that the rooms could only be "used as a store or for some such purpose, and not for that for "which they were designed which the tenant is under covenant "to preserve and not to alter." The Lord Chief Justice relied largely, as will be seen, on the fact that to hold that residence was a breach would be in effect to sterilize a large part of the property and prevent it from being used for the purposes for which it was designed. To the like effect is *Levermore* v. *Jobey*,[10] already cited, where the question was similar to that in the case above cited. Here again, the covenant was construed, having regard to the nature of the demised property, not to prevent user by residence. These cases, of course, turned upon the particular words used and the surrounding circumstances; and both are here different. If the demised property consists in part of trade premises and in part of living quarters, it is natural to give the covenant a meaning which confines its operation to the trade portion and does not make the rest of the property unusable. This shop and basement are not, on the face of it, suitable for a dwelling-house. They constitute in effect one of four lock-up shops. They are adapted for shopkeeping. Consequently, when I find a covenant to use for showrooms, workrooms and offices only, coupled with a restriction covering a wide area of trades, it appears to me that this clearly means that the property is to be used for trade purposes only and then only for certain trades, and that to use the property as a dwelling-house is a clear breach of covenant. On this point, therefore, I am of opinion that the plaintiffs succeed.

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[8] [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423.

[9] [1954] 1 Q.B. 446, 452.

[10] [1956] 1 W.L.R. 697.

I must next deal with the issue of rectification. The defendant sought to have inserted a proviso expressly allowing him to reside on the premises. Now, according to his evidence, which I accept on this point, this was the very request which he made to Jones on the telephone in December, 1947, and which Jones categorically refused, being under the impression this would be a breach of the covenants of the head-lease. The defendant argued that both sides did in fact intend that the defendant should be allowed to reside; but even if that be so, there was clearly no common intention to insert such a provision in the lease, for the very clear reason that the plaintiffs wished to avoid the mischief of the Rent Restrictions Acts. The plea of rectification therefore fails.

The next issue is that of waiver. Now residence, contrary to the covenants of the lease, is a continuing breach and therefore prima facie it is only waived by the acceptance of rent down to the date of that acceptance and there is a new breach immediately thereafter which is not waived. My attention was called to a number of cases which show that acts of waiver may be so continuous that the court is driven to the conclusion that there has been a new agreement for letting or a licence or a release of the covenant. The cases cited on this subject show acquiescence continuing for a very long period of years. For instance, in *Gibson* v. *Doeg*[11] the period was 20 years, in *Gibbon* v. *Payne*[12] it was 40 years, and in *Hepworth* v. *Pickles*[13]

[11] (1858) 2 H. & N. 623.

[12] (1905) 22 T.L.R. 54.

[13] [1900] 1 Ch. 108.

24 years. In the more recent case of *Lloyds Bank* v. *Jones*[14] Singleton L.J. points out that no particular period such as 20 years is required. Morris L.J. says this[15]: "The judge in "his judgment held that the conduct of the landlords in "standing by from May 23, 1934, until January 31, 1951, "without protest at the respondent's non-residence on the "holding constituted waiver, or release of, or acquiescence in, "the respondent's breach of clause 15, and that the landlords "were now estopped from alleging that the respondent had committed a breach of clause 15. On the admitted facts I cannot "see that any implication arises that the landlords agreed that "they would never again insist on full performance of clause 15. "It may well be that if they accepted rent with knowledge they "waived breaches of covenant from time to time, but I can see "no reason why they should be prevented from demanding "proper compliance as from the date they required it. There "may be conduct from which can be implied the waiver or "abandonment of a right. I do not think that the landlords so "conducted themselves that they could not assert that clause 15 "should be honoured. There was no reason why after the death "of Mrs. Minnie Bach they should not say that, though they "had not been insisting upon the full and strict compliance with "the covenant in clause 15 in the past, they proposed to require "compliance for the future. The present case differs on its facts "from such cases as *Gibson* v. *Doeg*[16] and *Hepworth* v. "*Pickles*.[17] It could not here be said that a judge or a jury "could infer from the landlords' conduct and the admitted facts "that the landlords had given some form of irrevocable licence, "or some form of release, which had the effect that the covenant "in clause 15 could not in the future be regarded as effective "and subsisting."

Again, in *Wolfe* v. *Hogan*[18] I find this in the headnote[19]: "The mere acceptance of rent by the landlord from the tenant, "after he had knowledge of the change of user by the tenant, "though it continues for some time, does not, by itself, constitute such acceptance by the landlord of the changed position "as to show that the house has been let as a separate dwelling"; and Denning L.J., after dealing with the facts, says this[20]: "A

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[14] [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5.

[15] [1955] 2 Q.B. 298, 326.

[16] 2 H. & N. 623.

[17] [1900] 1 Ch. 108.

[18] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[19] [1949] 2 K.B. 194.

[20] Ibid. 205.

"house or a part of a house originally let for business purposes "does not become let for dwelling purposes unless it can be "inferred from the acceptance of rent that the landlord has "affirmatively consented to the change of user. Let me illustrate that from the common law doctrine as to waiver of "forfeiture. A breach of covenant not to use premises in a "particular way is a continuing breach. Any acceptance of rent "by the landlord, after knowledge, only waives the breaches up "to the time of the acceptance of rent. It does not waive the "continuance of the breach thereafter and, notwithstanding his "previous acceptance of rent, the landlord can still proceed for "forfeiture on that account. Indeed, in the case of a continuing "breach, the acceptance of rent, after knowledge, is only a bar "to a claim for forfeiture if it goes on for so long, or is accepted "in such circumstances, that it can be inferred that the land-"lord has not merely waived the breach but has affirmatively "consented to the tenant continuing to use the premises as he "has done." I cannot think that anything proved here amounts to a release by the landlord of his rights. He knew, indeed, that the tenant was using the property to sleep in, but I do not think he knew more than that. At that he was willing to wink, but I am unable to find a release of the covenant or an agreement for a new letting. In my judgment, therefore, the plea of waiver fails.

There remains the so-called question of estoppel. This, in my judgment, is a misnomer and the present case does not raise the controversial issue of the *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[21] decision. This is not a case of a representation made after contractual relations existed between the parties to the effect that one party to the contract would not rely on his rights. If the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would execute it in the form put before him, the landlord would not seek to enforce against him personally the covenant about using the property as a shop only. The defendant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile. The case is truly analogous to *In re William Porter & Co. Ltd.*[22] This is a decision of Simonds J., who said [23]: "I come to the final point, the point which has given me difficulty "in this case, and it is this." Then he states some of the facts, which were very different from the facts here, but he goes on in this way: "It was an act intended to induce the company to "take a certain course of action, to carry on its business, to enter "into transactions and to incur obligations which, but for that "resolution, it might not have done. It appears to me that there "is some direct evidence here, and, in my judgment, I am "entitled to apply the rule, stated nowhere better than in the "old case of *Cairncross* v. *Lorimer*.[24] This was a Scottish appeal "to the House of Lords, where Lord Campbell L.C. said, after "some observations which are not material to the present case [25]: "'The doctrine will apply which is to be found, I believe, in the "'laws of all civilized nations, that if a man, either by words or "'by conduct, has intimated that he consents to an act which "'has been done, and that he will offer no opposition to it, "'although it could not have been lawfully done without his "'consent, and he thereby induces others to do that from which "'they otherwise might have abstained, he cannot question the "'legality of the act he had so sanctioned, to the prejudice of "'those who have so given faith to his words, or to the fair "'inference to be drawn from his conduct.' Also, a little further "on: 'I am of opinion that, generally speaking, if a party having "'an interest to prevent an act being done has full notice of its "'having been done, and acquiesces in it, so as to induce a "'reasonable belief that he consents to it, and the position of "'others is altered by their giving credit to his sincerity, he has "'no more right to challenge the act, to their prejudice, than "'he would have had if it had been done by his previous "'licence.'" In my judgment, the defendant's evidence is to be accepted on this point. No alternative explanation of his change of mind between the beginning and the end of December, 1947, is available, and I think he was a witness of truth. His evidence was uncontradicted, for Jones remembered nothing about it.

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[21] [1947] K.B. 130; [1956] 1 All E.R. 256.

The plea that this was a mere licence retractable at the plaintiffs' will does not bear examination. The promise was that so long as the defendant personally was tenant, so long would the landlords forbear to exercise the rights which they would have if

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[22] [1937] 2 All E.R. 361.

[23] Ibid. 363.

[24] (1860) 3 L.T. 130.

[25] Ibid.

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Harman J.

he signed the lease. He did sign the lease on this promise and is therefore entitled to rely on it so long as he is personally in occupation of the shop.

The result is, that on this point the defence succeeds; and I propose to dismiss the action. I may add that if I had been of a different opinion, I should certainly have allowed the defendant relief against forfeiture under the Law of Property Act; but that, of course, would have been upon the footing that he ceased to reside or to sleep on the premises, which would have been a different result. I propose, therefore, to dismiss the counterclaim, the burden of which was rectification, a plea which failed.

Judgment for the defendant.

Solicitors: *Forbes & Son; Groos, Guest, Lowden & Hazell.*

P. P.

BULLOCK *v.* UNIT CONSTRUCTION CO. LTD.

[1956 J. 2142.]

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July 7, 8, 9, 22.

Wynn-Parry J.

Residence — Company — Income tax — Test of residence — "Superior or "directing authority"—Finance Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

Three companies, which were wholly owned subsidiaries of Alfred Booth & Co. Ltd., a company resident in the United Kingdom, were at all material times registered and resident in East Africa. The boards of the three subsidiaries were entirely distinct from the board of the parent company but the board of the parent exercised control in matters of policy and in effect told the boards of the African subsidiaries what to do and those boards always accepted the instructions and acted accordingly.

The respondent company, also a wholly owned subsidiary of Alfred Booth & Co. Ltd., made certain payments to the African subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the African subsidiaries were resident in the United Kingdom within the meaning of section 20 (9) of the Finance Act, 1953,[1] then the payments in

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[1] Finance Act, 1953, s. 20 (9): "For the purposes of this section "'company' includes any body corporate, but references to a company "shall be taken to apply only to a "company resident in the United "Kingdom and carrying on a trade "wholly or partly in the United Kingdom. . . ."

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question were subvention payments which the respondent was entitled to deduct:—

Held, (1) that a company was resident where the superior or directing authority was; that authority being properly exercisable only within the framework of the constitution of the company concerned.

Dicta of Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners* (1952) 34 T.C. 207, 271; [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 and of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15, 241 applied.

(2) That the board of the parent company did not fall within the phrase "superior or directing authority," because it had no authority over the boards of the African subsidiaries, and because the boards of the African subsidiaries were not bound, under their respective constitutions, to accept the instructions of the board of the parent company.

(3) That the superior or directing authorities of the African subsidiaries could not, therefore, be said to exist in the United Kingdom and they were not resident there within section 20 (9) of the Finance Act, 1953.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the commissioners held on May 15, 17, 18 and 24, 1956, the Unit Construction Co. Ltd. (hereinafter called "Unit") appealed against assessments to income tax made upon it under Case I of Schedule D for the year 1953/54 in the sum of £110,000 less £36,388 capital allowances, and for the year 1954/55 in the sum of £200,000 less £50,000 capital allowances.

The appeal concerned certain payments made by Unit, which Unit claimed to deduct in computing its profits for the purposes of the assessments under appeal. These payments comprised substantial sums paid to Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. in 1952 and 1953.

The sole question in dispute was whether Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. were, in 1952 and 1953, companies resident in the United Kingdom within the meaning of subsection (9) of section 20 of the Finance Act, 1953. It was common ground that if they were so resident then the payments in question were subvention payments which Unit was entitled to deduct in computing its profits, by virtue of the said section 20.

The following facts appear from the case stated: Unit was a wholly owned subsidiary of Alfred Booth & Co. Ltd. Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries

Ltd. (which, when necessary to refer to them together, are hereinafter called " the African subsidiaries ") were also wholly-owned subsidiaries of Alfred Booth & Co. Ltd.

It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa.

Alfred Booth & Co. Ltd. was a company incorporated and resident in England, and was the parent of a group of 10 or more companies trading in many parts of the world. It was incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions, and it did carry on a number of businesses in different parts of the world (including, in particular, building contracting, and businesses connected with the leather industry) all of which it had, by August, 1949, transferred to subsidiary companies incorporated for the purpose. In August, 1949, it adopted a new memorandum of association with the objects of an investment trust company, with power to carry on the business of banking.

The board of directors of Alfred Booth & Co. Ltd. met regularly in London. In addition to the board meetings, a committee of executive directors held weekly meetings in London. The chairman of the board of directors and of the executive committee was J. W. Booth; he had been a director since 1935; in May, 1950, he became a managing director (with special responsibility on the board and on the executive committee for the African subsidiaries); in July, 1952, he became chairman, and at the same time the special responsibility for the African subsidiaries was divided as under:

J. W. Booth was responsible for their general trading and mining interests; E. Booth (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their building interests; E. W. Espenhahn (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their hide and skin and tanning interests.

The African subsidiaries, which were incorporated in 1948 and 1949 with the objects set out in their respective memoranda of association, were:

(a) *Booth & Co. (Africa) Ltd.* Building contracting in East Africa. A mining venture in Uganda. A forwarding agency at Mombasa, which acted principally as agent for the African subsidiaries themselves.

A merchanting business was carried on as a separate department under the name of Bulleys Trading Company.

(b) *Booth & Co. Ltd.* The business consisted in the earning of commissions by purchasing hides and in the purchase and sale of skins, and was conducted through a number of posts set up in East Africa. In the case of hides, the company acted as agents for Hollander Hyams Ltd. (a company which had no connexion with the Alfred Booth & Co. Ltd. group of companies). This part of the business was governed by an agreement dated October 17, 1950, which allowed Booth & Co. Ltd. to supply a limited number of hides to Bulleys Tanneries Ltd. and other tanneries within the Alfred Booth & Co. Ltd. group of companies. In the case of skins the company acted as principals.

(c) *Bulleys Tanneries Ltd.* Manufacturing in Kenya leather for sale locally, and manufacturing or part-manufacturing leather for export to England, where the product was sold on behalf of Bulleys Tanneries Ltd. by Booth & Co. (England) Ltd.

Each of the African subsidiaries was incorporated in Kenya under the Kenya Companies Ordinance and had its registered office in Nairobi. The articles of association of each of them contained provisions placing the management and control of its business in the hands of its directors and providing that directors' meetings might be held anywhere outside the United Kingdom. It was the intention of the directors of Alfred Booth & Co. Ltd. (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also in order to forestall any question which might arise in connexion with any future nationalization, particularly of the building industry. It turned out, owing to disturbances in Kenya and other difficulties, that they incurred losses (except for the department known as Bulleys Trading Company, which made profits), and this was a source of great anxiety to Alfred Booth & Co. Ltd. which had sunk considerable sums of money in them, as it reflected on the financial position of the Alfred Booth group of companies as a whole. J. W. Booth, who was brought into the detailed control of the African subsidiaries on his appointment as a managing director of Alfred Booth & Co. Ltd. in 1950, considered that the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of Alfred Booth & Co. Ltd. in London. He considered that his principal job was to manage them. The board of directors of Alfred Booth & Co. Ltd., after discussions, decided that as a result of the lack of success of the African subsidiaries they were forced to take over management and control, in order to save their company's investment; at the same time it was their policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity should arise. There was at no time any formal agreement with the African subsidiaries that the directors of Alfred Booth & Co. Ltd. should manage them; the intention of the said directors to do so was communicated to one, P. Meinertzhagen (the chairman of the board of directors of each of the African subsidiaries), and accepted by him. As a result, from 1950 onwards the directors of Alfred Booth & Co. Ltd. in London began to intervene in the affairs of the African subsidiaries in the manner hereinafter set forth; they were aware that their action in so doing might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation.

The chairman of the directors of each of the African subsidiaries was at all times P. Meinertzhagen. He had been (prior to 1948) an employee of Alfred Booth & Co. Ltd., in England, and went to Africa to form and supervise the African subsidiaries. He was not at any material time a director of Alfred Booth & Co. Ltd., he had no contract of service with any company in the group, and his remuneration took the form of a salary paid to him by Booth & Co. Ltd. (the other two African subsidiaries refunding Booth & Co. Ltd., part of it). He was described in the correspondence and in staff lists as "Alfred Booth & Co. "Ltd., senior representative in East Africa."

The other directors of the African subsidiaries (who varied from time to time) were all persons employed by and holding contracts of service with the companies of which they became directors. Only one of them was a director of more than one of the African subsidiaries; this was one Trembath, who left in 1952, and was occasionally described or referred to as "Number "2" to Meinertzhagen. These directors were all elected to the boards of the African subsidiaries on the instructions of the parent company, Alfred Booth & Co. Ltd., and their contracts of service were made in London by Alfred Booth & Co. Ltd., as agent for the African subsidiary concerned. None of these directors was at any time a director of Alfred Booth & Co. Ltd. When occasion arose (as it did arise more than once) for removing one of them from office, the decision was taken in London by the directors of Alfred Booth & Co. Ltd., to determine his contract of service and remove him, and instructions to that effect were issued by Alfred Booth & Co. Ltd., to Meinertzhagen. When any question arose (as it did arise) of compensating a director or member of the staff of an African subsidiary for removal or dismissal, it was dealt with by the directors of Alfred Booth & Co. Ltd.; for this purpose they used Meinertzhagen as an intermediary, or as happened on one occasion, one of their number flew to East Africa to negotiate terms. The directors of the African subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.

The minute books of the directors' meetings of each of the African subsidiaries, recorded, in the main, only formal business (such as particulars of annual general meetings, appointments and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they recorded more important business, but in each such instance a decision had in fact been taken by the directors of Alfred Booth & Co. Ltd., in London and the record in the minute book of the African subsidiary merely formally records its implementation. Meinertzhagen was recorded as present at each such meeting, with one or two other directors; in many cases, however, the directors recorded as being present had not actually met at all and might not have known that any meeting was supposed to be taking place, as directors as a rule were not notified of any meetings. All the minutes purporting to record meetings prior to 1952 were written up in 1952, to comply with law, on the instructions of the directors of Alfred Booth & Co. Ltd. They were written up from records that had been typed and kept loose in a book by previous company secretaries. In most cases, where the minute book recorded a meeting and business transacted thereat, the business recorded was in fact transacted by Meinertzhagen (in all matters of any importance, on the instructions of Alfred Booth & Co. Ltd.) and the minute was written afterwards. In no case did the directors of any of the African subsidiaries sit round a table as a board, and they never either took any decision as a board, met as a board, or were summoned to meet as a board.

At all material times the boards of directors of the African subsidiaries did not and for all practical purposes could not

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manage and control the businesses of their respective companies. If they had tried to manage and control their companies' businesses (otherwise than in accordance with instructions from the directors of Alfred Booth & Co. Ltd.) Alfred Booth & Co. Ltd. would have removed them from office.

At all material times the whole of the trading policy of the African subsidiaries was dictated by the board of directors of Alfred Booth & Co. Ltd. and was implemented by Meinertzhagen as their senior representative and chairman of the African subsidiaries. Meinertzhagen was, however, consulted on occasions before a decision was taken, and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. He made two visits to London in 1952 and 1953, having been summoned to attend discussions with the directors of Alfred Booth & Co. Ltd., on various aspects of the affairs of the African subsidiaries. There were also occasions when a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

Article 145 of the Kenya Companies Ordinance provided that every company should keep at its registered office a register of its directors or managers, and provided for the case of registration of a corporation as a director or manager. Subparagraph (6) thereof provided that "... a person in accordance with whose "directions or instructions the directors of a company are "accustomed to act shall be deemed to be a director and officer "of the company." At no time was the name of Alfred Booth & Co. Ltd. or of any director of that company included in the register of directors of any of the African subsidiaries.

At all material times every aspect of the businesses carried on by the African subsidiaries was under scrutiny by the executive directors of Alfred Booth & Co. Ltd. at their weekly meetings in London.

The commissioners found (as a conclusion of fact from a great deal of detailed evidence before them) that the aim of the directors of Alfred Booth & Co. Ltd. was to have a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African undertakings, which could be relied on to implement their own policy decisions without the necessity of frequent visits to Africa by themselves. In 1952 and 1953 the day-to-day management of the undertakings was broadly supervised by Meinertzhagen, who was responsible for local (East African) management within the instructions and limitations (financial and otherwise) imposed upon him by the directors of Alfred Booth & Co. Ltd.; the work involved imposed too great a burden on him in view of the particular difficulties existing at that time and the fact that the undertakings were spread between Kampala and Mombasa. In particular, they were anxious to have a reliable "Number 2" to him who could act during his absence.

The mining venture, which was in form one of the activities of Booth & Co. (Africa) Ltd., was in fact almost entirely managed from London. J. W. Booth authorized the purchase of a claim on a visit to Nairobi; after certain initial steps had been taken, it was financed entirely by Alfred Booth & Co. Ltd. without recourse to the African subsidiary's bankers; the decision to start mining was taken by the executive directors in London; they sent out an expert to advise and report on the mine, and they decided what the rate of production should be, how much labour should be employed and what vehicles should be used. The manager of the mine made reports from time to time direct to them, without going through the channel of Booth & Co. (Africa) Ltd.

The agreement with Hollander Hyams Ltd., under which Booth & Co. Ltd. disposed of most of its hides, was negotiated in London between Hollander Hyams Ltd. and Alfred Booth & Co. Ltd., as agents for Booth & Co. Ltd. In the day-to-day working of the agreement, Hollander Hyams Ltd. normally dealt directly with Booth & Co. Ltd.

In 1952 and 1953 it was part of the policy of the board of directors of Alfred Booth & Co. Ltd. to sell any of the assets or undertakings of the African subsidiaries if opportunity offered, and they supervised negotiations (mainly carried out on their instructions by Meinertzhagen in Africa) for selling the tannery and, on another occasion, the mine. These negotiations proved abortive.

Throughout the material period the staff and officials of the African subsidiaries were making decisions concerning the day-to-day running of the trading activities of the African subsidiaries, within the general policy directions of Alfred Booth & Co. Ltd.

The United Kingdom subsidiaries of Alfred Booth & Co. Ltd. were managed by the parent company in the same way as the African subsidiaries. The company also had two subsidiaries in the United States of America which, however, were not subject to the same detailed control.

It was contended on behalf of Unit: (1) that each of the African subsidiaries was resident in the United Kingdom at all material times, within the meaning of section 20 (9) of the Finance Act, 1953; (2) that Unit was accordingly entitled to deduct the payments referred to above; and (3) that the assessments be reduced accordingly.

It was contended on behalf of the Crown: (1) that, as the African subsidiaries were admittedly resident in East Africa at all material times, they could not also at those times be resident in the United Kingdom; (2) that in any event none of the African subsidiaries were resident in the United Kingdom at any material time; and (3) that Unit was not entitled to the deductions claimed.

The commissioners who heard the appeal gave their decision as follows:

" We think, in addressing our minds to the question whether " the African subsidiaries were resident in the United Kingdom " in the material period, that the first question we have to " consider is what was the real situation regarding their manage" ment and control.

" A number of (what have been described as) the acts of " interference in their management by the directors of Alfred " Booth & Co. Ltd. are equivocal, being equally well explained " as acts of parental or group control, or as the taking over of the " reins of management; others again are equivocal, being equally " well explained as the financial control of a creditor, or as the " taking over of the reins of management. . . .

" We find that the position was at the material times that the " boards of directors of the African subsidiaries (who are the " people one would have expected to find exercising control and " management) were standing aside in all matters of real import" ance and in many matters of minor importance affecting the " central management and control, and we find that the real " control and management was being exercised by the board of " directors of Alfred Booth & Co. Ltd. in London.

" But it was contended on the part of the Crown that that " finding would not be enough to conclude the question before us; " it was said that there must be something more, that is, that " before we could find that the African subsidiaries were resident " in the United Kingdom, we must find control exercised here " under the constitution of the company concerned, by those " officers to whom such constitution gives it; in other words, the " Crown contended that we must find some ' formal ' control and " management here. We have considered this contention very " carefully and have come to the conclusion that the authorities " cited to us do not constrain us to accept it nor do they point " very strongly to the conclusion that it is right. On the contrary, "we notice that Lord Loreburn in his judgment in *De Beers Consolidated Mines Ltd.* v. *Howe* [2] directs attention to 'where the 'central management and control actually abides,' and we think "it would be consistent with Lord Loreburn's reasoning to stress "the word 'actually.' In the course of the arguments before us "both sides relied on the remarks of Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[3] and in "particular on his reference to 'where the controlling power and 'authority which, according to the ordinary constitution of a 'limited liability company, is vested in its board of directors, 'and the exercise of that power and authority, is to some substantial degree to be found.' [4] In the appeal before us, we find "the controlling power and authority, which according to the "constitution of each of the African subsidiaries is vested in its "board of directors, is actually exercised, to a very substantial "degree, by the board of Alfred Booth & Co. Ltd. in London. "We hold, on our understanding of the authorities, that once we "have found that as a fact, it is not necessary to go further and "inquire whether such power and authority is exercised under the "constitution of the company concerned by the officers to whom "such constitution gives it.

"For these reasons we find, and so far as it is a matter of law "we hold, that each of the African subsidiaries was resident in "the United Kingdom in 1952 and 1953. We do not think that we "are precluded from coming to this conclusion by reason of the "admitted fact that the African subsidiaries were at the material "times resident in East Africa, having regard to the judgment "of the Master of the Rolls in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*.[5]"

The points of law for the opinion of the court were: (1) whether there was evidence upon which the commissioners could arrive at their findings of fact; and (2) whether their conclusions were wrong in law.

Roy Borneman Q.C. and *Alan Orr* for the Crown. The African subsidiaries were set up with the intention that they should not pay United Kingdom tax: see section 20 of the Finance Act, 1953. Assuming that the test of residence of a company is where the central management and control of the company actually abides, and, if it be right, that a company can be resident in two countries (see *Swedish Central Railway Co. Ltd.* v. *Thompson* [6]), then as regards the country in which the companies are alleged to be resident in the circumstances of this case, it must be shown that there is some part of the supreme and directing authority there. When using the phrase "supreme "and directing authority" it must mean power and authority vested according to the ordinary constitution of a limited liability company, that is, its own board, and it is not enough to point to directors of the parent company whose only interest is that of a controlling shareholder. The corollary to that is: the supreme and directing authority either as a whole or in part cannot be present when no part of the formal legal entity of the company is to be found in the country in which it is alleged to be resident. The articles of the company remain the same and the person who holds the purse strings cannot alter them.

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[2] [1906] A.C. 455; 5 T.C. 198.

[3] (1952) 34 T.C. 207, 271; [1952] 2 T.L.R. 582; [1952] W.N. 119; [1952] 1 All E.R. 646.

[4] 34 T.C. 207.

[5] Ibid.

The minutes show the constant attention by the board of the parent company to the affairs of the African subsidiaries. The Crown admits that all aspects of the subsidiaries were under constant survey in London. But this is a feature of any company controlled by a parent, especially if its investments are in jeopardy. The parent, when it appoints members of its own board as directors, is acting solely as corporator, especially if it is an investment holder and not a trader. Before this case there was no suggestion that a residence could be found where no part of the legal entity of the company was to be found. [Reference was made to the provisions regarding board meetings and general meetings and to *Gramophone and Typewriter Ltd.* v. *Stanley.*[7]] The directors cannot be heard to say that the constitution is of no account. It is to be remembered that the directors of the African subsidiaries cannot meet in the United Kingdom. [Reference was made to the Kenya Companies Ordinance, 1933, p. 107, and to the Articles of Association of Booth & Co. (Africa) Ltd.]

If the taxpayer's contention were right, where would the matter end? There would be a shuttlecock from country to country following the movements of the controlling shareholder who directed policy. What would be the position if there was someone controlling him? He would not be entitled to say that the supreme and directing authority was outside the constitution of the company. If a company wants to come back to the United Kingdom it must change its articles.

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[6] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

[7] [1908] 2 K.B. 89; 5 T.C. 358.

Heyworth Talbot Q.C. and *J. Creese* for the taxpayer. There is no judicial authority for the proposition that a company cannot be held to be resident in the United Kingdom unless some part of the supreme and directing authority is located in the United Kingdom, that authority being conferred by the written constitution of the company, and that one must, therefore, find articles or regulations or a by-law vesting authority in a person in this country. All that one need do is to provide in the constitution of the company where the company resides, and then it does not matter what control there is from the United Kingdom. There is no admission by us that some part of the supreme and directing authority is in Kenya. The admission was that the African subsidiaries were resident in Kenya, but that may have been made under a misapprehension of law.

In this case one must look at realities, for reality is what matters in tax law. A company resides where the de facto management and control is to be found, and looking at the paragraph of the case stated dealing with the entries in the minute books of the African subsidiaries it is clear that the boards of the African subsidiaries never functioned as such at all. The facts of this case are without precedent, but the test to be applied is where, on these facts, the control and management of the African subsidiaries was in fact. All the authorities look at the matter de facto, not de jure: see especially *De Beers Consolidated Mines Ltd.* v. *Howe*,[8] *per* Lord Loreburn L.C., where he said[9]: " . . . " This is a pure question of fact to be determined . . . upon a " scrutiny of the course of business and trading." That passage bears out the submission that the court will look only at facts in order to determine where the central management and control actually abides. [Reference was also made to the judgment of Buckley L.J. in *Gramophone and Typewriter Ltd.* v. *Stanley*.[10]] In *American Thread Co.* v. *Joyce*[11] Buckley L.J. used the words " in fact controlled." In *Union Corporation Ltd.* v. *Commissioners of Inland Revenue*[12] Lord Evershed's phrase " controlling " power and authority " is capable of two constructions. In applying it to this case it is ambiguous.

To summarize, one starts with the proposition of Lord Loreburn's in *De Beers Consolidated Mines Ltd.* v. *Howe*,[13] which has been unassailed for 50 years. In the phrase "where the "central management and control actually abides," "abides" means "is to be found." By the constitutions of the companies it was vested in the respective boards, but it was to be found actually in the parent company (see the commissioners' findings).

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[8] [1906] A.C. 455; 5 T.C. 198.

[9] [1906] A.C. 455, 458.

[10] [1908] 2 K.B. 89, 106, 107.

[11] (1912) 6 T.C. 1, 30, 31.

[12] 34 T.C. 207, 271.

[13] [1906] A.C. 455, 458.

It is not open to us to set aside the admission that the African subsidiaries were resident in Kenya, but we challenge the inference made from it that some part of the central management was in Kenya. Such an admission is stultified by the findings. [*Todd* v. *Egyptian Delta Land and Investment Co. Ltd.*[14] was also referred to.]

Borneman Q.C. in reply. It was admitted that the African subsidiaries were resident in Kenya. It is clear from the *Egyptian Delta* case [14] that mere incorporation is not enough, but there is ample material to add to that in this case. Taking one only of the many facts that support the admission, it is clear that the chairman of the African subsidiaries spent most of his time in Africa.

Cur. adv. vult.

July 22. WYNN-PARRY J. read the following judgment: In the case the special commissioners rightly pose the question as follows: "The sole question in dispute was whether Booth & "Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. "were, in 1952 and 1953, companies resident in the United King-"dom within the meaning of section 20 (9) of the Finance Act, "1953."

In paragraph 4 of the case the special commissioners say: "It was admitted on behalf of Unit that the African sub-"sidiaries were at all material times resident in East Africa." Mr. Heyworth Talbot, on behalf of Unit, submitted that I should give no colour to that admission, because it could not be said with precision what were the grounds on which it was made or how far it was intended to go. I cannot accept this submission. A study of the case convinces me that the admission was not only proper, but inevitable. In my view, if it had been contended that the African subsidiaries were not resident in East Africa, the special commissioners would have been bound to find that they were resident in East Africa for taxation purposes. Not only were all those companies registered in East Africa, but they carried on business there; the members of the respective boards were resident there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom. In short, every necessary step was taken to ensure that, having regard to the state of the authorities, if the residence of the African subsidiaries should become a material matter for consideration, the inevitable conclusion would be that they were each resident in East Africa.

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[14] [1928] 1 K.B. 152; [1929] A.C. 1; 43 T.L.R. 275; 44 T.L.R. 747; 11 T.C. 14, 119.

The next, and indeed the main, submission put forward by Mr. Heyworth Talbot was that, as the special commissioners held, the African subsidiaries were also resident in the United Kingdom over the material period. As will be seen from the careful and exhaustive statement of the evidence on behalf of the respondents, which the special commissioners accepted, the board of directors of Alfred Booth & Co. Ltd. (the parent company) in effect told the boards of the African subsidiaries what to do, and those boards accepted the instructions and acted accordingly. In those circumstances, it is argued that the reality of the matter is that the real business of these companies is carried on in the United Kingdom as being the country where the central management and control abided. It is accepted by Mr. Talbot that this argument involves going further than any authority to be found in the books. I do not intend to multiply reference to authority, but I would say this. Speaking broadly, prior to *Swedish Central Railway Co. Ltd.* v. *Thompson* [1] the courts were concerned with cases in which the dispute was as to which one of two or more alleged places was to be regarded as the place where the company concerned was to be regarded as resident. No question of dual residence arose. It is against that background that the cases prior to the *Swedish Railway* case [2] have to be considered.

In *De Beers Consolidated Mines Ltd.* v. *Howe* [3] Lord Loreburn said [4]: " Mr. Cohen propounded a test which had the merits " of simplicity and certitude. He maintained that a company " resides where it is registered and nowhere else. If that be so, " the appellant company must succeed, for it is registered in " South Africa. I cannot adopt Mr. Cohen's contention. In " applying the conception of residence to a company, we ought, " I think, to proceed as nearly as we can upon the analogy of an " individual. A company cannot eat or sleep but it can keep

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[1] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

[2] [1925] A.C. 495.

[3] [1906] A.C. 455; 5 T.C. 198.

[4] [1906] A.C. 455, 458.

"house and do business. We ought, therefore, to see whether it "really keeps house and does business. An individual may be of "foreign nationality, and yet reside in the United Kingdom. So "may a company. Otherwise, it might have its chief seat of "management and its centre of trading in England, under the "protection of English law, and yet escape the appropriate taxa-"tion by the simple expedient of being registered abroad and "distributing its dividends abroad. The decision of Kelly C.B. "and Huddleston B. in *Calcutta Jute Mills* v. *Nicholson* [5] "and *Cesena Sulphur Co.* v. *Nicholson*,[5] now thirty years ago, "involved the principle that a company resides, for purposes of "income tax, where its real business is carried on. Those "decisions have been acted upon ever since. I regard that as the "true rule; and the real business is carried on where the central "management and control actually abides."

I desire to lay emphasis on the reasoning of Lord Loreburn which led him to state the rule as he did in the passage which I have quoted. It is, I think, to be found in the words: "Otherwise, "it might have its chief seat of management and its centre of "trading in England, under the protection of English law, and "yet escape the appropriate taxation by the simple expedient of "being registered abroad and distributing its dividends abroad." When Lord Loreburn says: "its chief seat of management," he must mean the company's chief seat of management, and not the seat of management of any other company: in other words, "the chief seat of management as set up within the constitu-"tion of the company." If that be the true implication to be drawn from Lord Loreburn's words, then *De Beers Consolidated Mines Ltd.* v. *Howe* [6] does not help Mr. Heyworth Talbot.

To my mind, however, the matter does not rest on mere implication. There are two authorities, both Court of Appeal decisions, which I regard as negativing the proposition which Mr. Talbot puts forward, and as supporting the view that in order that a company resident abroad can claim the benefit of residence in this country, it must be shown that the Acts relied on as constituting such residence were done within its constitution. If they were not so done, they are not the acts of the company, and are not to be taken into consideration. The first of the two authorities is *Gramophone and Typewriter Ltd.* v. *Stanley*.[7] In that case the company held all the shares in a

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[5] (1876) 1 Ex.D. 428.

[6] [1906] A.C. 455.

[7] [1908] 2 K.B. 89; 5 T.C. 358.

German subsidiary. The German subsidiary was not shown to be a mere simulacrum of the English company, the mere existence of a power of ultimate control not being held sufficient to lead to such a conclusion. In the course of his judgment Lord Cozens-Hardy M.R. said [8]: "The German company was established in Germany in 1900 in accordance with German law. It was undoubtedly a company with several shareholders who brought in considerable capital. One of those shareholders was an English company, whose undertaking was subsequently acquired by the present English company. At some date which is not stated, the English company acquired all the shares of the German company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him, by exercising his voting powers, to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become for all taxing purposes his business. Whether this consequence follows is in each case a matter of fact. In the present case I am unable to discover anything in addition to the holding of the shares, which in any way supports this conclusion. The German company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English company. It has its board of management and its board of supervision as required by the German law. Its accounts are made out in accordance with German law. On the other hand, the English company has its board of directors, some of whom are on the German board. It has a proper account and balance sheet in which its interest in the German company is described

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[8] [1908] 2 K.B. 89, 95, 96.

" accurately as so many shares in the German company, and the " gross profits of the German company are in no way brought " into the profit and loss account of the English company. " Against this the only thing to be said is that the chairman of " the English company made a foolish speech in which he treated " the gross profits of the German company as profits of the " English company; but the dividend declared by the English " company did not proceed upon this footing. In my opinion it " would be wrong to attribute to the loose and inaccurate language " of the chairman a force sufficient to override the formal acts " of both the English company and the German company and " all the other circumstances of the case."

Buckley L.J., in a well-known passage, said [9]: " Further, it " is urged that the English company as owning all the shares can " control the German company, in the sense that the German " company must do all that the English company directs. In my " opinion this again is a misapprehension. This court decided not " long since in the *Automatic Self Cleansing Filter Syndicate Co.* " *Ltd.* v. *Cuninghame* [10] that even a resolution of a numerical " majority at a general meeting of the company cannot impose its " will upon the directors when the articles have confided to them " the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; " they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may, by the " regulations, be entrusted with the control of the business, and if " so entrusted they can be dispossessed from that control only by " the statutory majority which can alter the articles. Directors " are not, I think, bound to comply with the directions even of " all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which " would generally be special resolutions, to remove directors who " do not act as they desire, but this in no way answers the " question here to be considered which is, whether the corporators " are engaged in carrying on the business of the corporation. In " my opinion they are not. To say that they are involves a " complete confusion of ideas. The inquiry may be put in " another form by asking who would be liable upon the contracts " of the German company? Obviously the German company " and not those who are the holders of its shares."

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[9] [1908] 2 K.B. 89, 105, 106.

[10] [1906] 2 Ch. 34.

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LTD.

Wynn-Parry J.

The second authority is *Union Corporation Ltd.* v. *Commissioners of Inland Revenue*.[11] In this case Lord Evershed M.R. gave the judgment of the court and, after an exhaustive review of the authorities, laid down a test for ascertaining whether or not it could be postulated of a company that it was resident in more than one place. It is true that, strictly speaking, his judgment on this point was obiter, but, given as it was after so much careful consideration, I should feel myself bound to accept it, apart from the circumstance that, if I may say so with respect, I wholly agree with it. I need cite only one passage[12]: "The "company may be properly found to reside in a country where "it 'really does business,' that is to say, where the controlling "power and authority which, according to the ordinary consti"tution of a limited liability company, is vested in its board of "directors, and the exercise of that power and authority, is to "some substantial degree to be found. In our judgment, the "formula 'where the central power and authority abides' does "not demand that the court should look, and look only, to the "place where is found the final and supreme authority.

"We have upon this difficult question derived great assistance "from the judgment of Sir Owen Dixon in the Australian case of "*Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of* "*Taxation*,[13] where the same problem was fully considered by "that learned judge and by the full High Court of Australia. "We cite one paragraph from Dixon J.'s judgment[14]: 'The "'better opinion, however, appears to be that a finding that a "'company is a resident of more than one country ought not to "'be made unless the control of the general affairs of the com"'pany is not centred in one country but is divided or distributed "'among two or more countries. The matter must always be "'one of degree and residence may be constituted by a combina"'tion of various factors, but one factor to be looked for is the "'existence in the place claimed as a residence of some part of "'the superior or directing authority by means of which the "'affairs of the company are controlled.' We accept and "respectfully adopt that passage as accurately stating the "solution of the problem."

In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls,[15]

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[11] (1952) 34 T.C. 207; [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646.

[12] 34 T.C. 207, 271.

[13] (1940) 64 C.L.R. 15.

[14] Ibid. 19.

[15] 34 T.C. 207, 271.

"that is to say, where the controlling power and authority which, "according to the ordinary constitution of a limited liability "company, is vested in its board of directors, and the exercise "of that power and authority is to some substantial degree to "be found," indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by Dixon J., "the superior or directing autho"rity." In that context "authority" must have a narrower meaning than "power." It must connote something which has been regularly established, and because of that regular establishment is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase "superior or directing authority." As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company have authority to give the instructions. As I have said, they have no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to Unit and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies can be said to exist in the place claimed as a residence, namely, the United Kingdom. Further, even if "authority" could be regarded as being synonymous with "power," the word "power" in the context would have to be read as "power regularly exercised."

If I have, as I hope is the case, rightly understood the test propounded by the Master of the Rolls, then there is furnished for the guidance of those interested in these matters a test clearly defined in its scope (and founded, if I may say so, on principles of common sense), with the result that certainty is achieved, the only possible difficulty (though hard to foresee) being in its application in a given case. If, on the other hand, Mr. Talbot's proposition were to be accepted, certainty goes, and the court would have to take into consideration, as material statements for the purpose of answering such a question as is posed here, acts (in this case the acts of the board of the parent company) which, on the reasoning in the *Gramophone* case,[16] must be regarded as irregular interference by a parent company in the affairs of a subsidiary.

In the result, in my view, the appeal succeeds and must be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Herbert Smith & Co.*

P. P.

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[16] [1908] 2 K.B. 89.

1958
Oct. 16, 17, 21.

Danckwerts J.

In re SEBBA, DECD.
LLOYDS BANK LTD. *v.* HUTSON AND OTHERS.

[1957 S. No. 2419.]

Administration of Estates—Order of application of assets—Death duty—Canadian assets—Canadian duties—Incidence—Expenses of getting in testator's estate—British estate duty credit.

Will—Construction—Investment clause—"South African trustee "securities"—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 1.

A testator, after giving a large number of pecuniary legacies and specific legacies of chattels, by clause 5 of his will directed that his residue be held on trust for sale and conversion "upon trust "(a) to pay thereout all my just debts funeral and testamentary "expenses and the legacies given by this my will or any codicil "hereto; (b) to invest the residue of such moneys in South African "trustee securities only with power to vary such investments for "others of a like nature. . . ." He gave his residue in various fractions on trusts for his relatives providing for life interests and interests in capital.

His personal estate included shares in companies situate in the Province of Ontario, Canada, South Africa and the United States of America; no part of these assets was specifically devised but they formed part of his residuary estate. The will contained no specific directions in respect of the payment of death duties. British estate duty at 50 per cent. was payable on the estate; and Dominion succession duty and Ontario succession duty were leviable on the Canadian assets; and South African estate duty and United States federal estate tax on the South African and United States assets. There was no real dispute that the latter two duties were payable out of the residuary estate. A credit was allowable by the Inland Revenue under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, in respect of the Dominion succession duty, and although no order existed in respect of the Ontario succession duty, the Inland Revenue by way of concession allowed the amount of duty levied to be deducted as a debt in assessing the value of the assets affected:—

Held, (1) that the Canadian duties were payable out of the general residue as part of the expenses of getting in the assets situate in that country.

Dicta of Jenkins L.J. in *In re Goetze* [1953] Ch. 96, 111–113; [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76 applied.

(2) That the interests given by the will must bear a rateable proportion of the British estate duty payable in respect of the Canadian assets.

(3) That the credit secured in respect of Canadian succession duty by the order of 1946, and the concession allowed in respect of the Ontario succession duty enured for the benefit of the persons by whom the British estate duty leviable in respect of those duties fell to be borne rateably according to the incidence upon them of the British estate duty.

In re Goetze (supra) and *In re Cunliffe-Owen* [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220 applied.

(4) That the testator's direction to invest in "South African "trustee securities only" did not compel the trustees to limit the investments to trustee investments within the meaning of the Trustee Act, 1925, but they could invest in such form of investments as were regarded by the courts of South Africa or any province thereof as suitable investments of trust funds.

ADJOURNED SUMMONS.

Adolph Sebba by his will, dated August 18, 1955, having appointed Lloyds Bank Ltd. as executor and trustee thereof, gave a large number of pecuniary legacies and specific legacies of certain chattels. By clause 4 he directed the bank to set aside from his estate "securities sufficient to raise the sum of £3 a "week to be paid to my late secretary Mrs. Winifred Birt-"well . . . for her life . . ." and after her death he directed the bank to divide the capital so appropriated equally between "my brothers Sam and Joe Sebba and my sister Sarah Lewis or "such of them as shall survive the said annuitant. . . ."

By clause 5 the testator devised and bequeathed all the residue of his real and personal estate on trust for conversion, and directed the bank to hold the net proceeds of sale and conversion and his ready money upon trust "(a) to pay thereout all my just "debts funeral and testamentary expenses and the legacies given "by this my will or any codicil hereto; (b) to invest the residue "of such moneys in South African trustee securities only with "power to vary such investments for others of a like nature at "the bank's discretion. . . ."

The testator by clause 5 (c) directed the bank to hold his residuary trust fund in various fractions on trusts for his relatives, providing for life interests and interests in capital. The testator gave the bank power to postpone sale and conversion, and by clause 8 he directed the bank "so soon as all executorial duties "shall have been completed to transfer and vest the whole of "my residuary trust fund to and in the Standard Bank of South "Africa Ltd. to hold the same upon and subject to the trusts "powers and provisions hereinbefore declared of and concerning "my said residuary trust fund. . . ."

The testator made a codicil dated September 28, 1955, by which he gave certain further pecuniary legacies and revoked one of the specific legacies in the will.

He died on September 29, 1955, domiciled in England.

He did not own any land, and left a large personal estate which included (1) shares in two companies situated in Ontario, a province of Canada, (2) shares in a gold mining company in South Africa, and (3) shares in the Radio Corporation of America in the United States.

Estate duty in England was leviable on the testator's estate at the rate of 50 per cent. South African estate duty amounting to the sum of £207 9s. 11d. became payable in respect of the South African shares, and Federal estate duty amounting to the sum of 102.46 United States dollars (about £36) became payable in the United States in respect of the Radio Corporation shares. In the case of the shares situate in Ontario, Dominion succession duty became leviable, and the amount was 3,788.86 Canadian dollars for principal and 11.44 Canadian dollars for interest, equal to about £1,380 in all. Ontario succession duty also became leviable, and the amount was 15,590.47 Canadian dollars for principal plus 344.39 Canadian dollars for interest, equal to a sum of £5,810 in all.

By reason of agreements made between the countries concerned, the sums paid in South Africa and the United States of America and the Dominion of Canada were allowed by the Commissioners of Inland Revenue in England as if they were payments on account of British estate duty, and credit was given for the amounts so paid against the sums payable for British estate duty. There was no corresponding agreement in respect of the Province of Ontario duty and a similar allowance was not admissible in respect of that duty, but the amount thereof was in effect allowed as a deductible debt in assessing the property on which British estate duty was levied.

The plaintiff bank took out this summons to have determined questions arising under the will of which the following questions were relevant to this report: whether on the true construction of the will and codicil of the testator: (1) the following duties (thereinafter referred to as " the foreign duties "), namely (i) succession duty of the Dominion of Canada, (ii) succession duty of the Province of Ontario, (iii) estate duty of the Union of South Africa, and (iv) Federal estate tax of the United States of America, leviable in respect of movable assets of the testator situate outside Great Britain at the time of his death and not specifically bequeathed by the said will or codicil (thereinafter collectively referred to as the " foreign assets "), and any interest payable in respect of the foreign duties, ought to be borne, as between the several persons beneficially interested: (a) out of the general residuary estate of the testator as expenses of getting in the foreign assets, or (b) out of the respective beneficial interests of the said persons, according to the incidence of the foreign duties and interests under the respective laws imposing the same, or (c) in some other and what manner . . . (3) the pecuniary legacies thereby bequeathed (other than those given by clause 4) ought to bear such rateable part of the estate duty leviable in respect of the foreign assets under the law of Great Britain (and any interest payable in respect of such duty) as was attributable to the said legacies respectively in a due course of administration pursuant to clause 5 of the will; (4) the annuity given to the defendant, Winifred Birtwell, by clause 4, and the other beneficial interests given by that clause ought in like manner as aforesaid to bear a rateable part of the estate duty leviable in respect of the foreign assets under the law of Great Britain (and any interest payable in respect of such duty); and if so, in what manner such estate duty ought to be taken into account in setting aside and subsequently dealing with the fund directed to be appropriated by the said clause 4; (5) the allowances obtainable under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, the Double Taxation Relief (Estate Duty) (South Africa) Order, 1947, and the Double Taxation Relief (Estate Duty) (U.S.A.) Order, 1946, by way of credit against estate duty leviable in respect of the foreign assets under the law of Great Britain, ought respectively, as between the several persons beneficially interested to enure for the benefit of (a) the general residuary estate of the testator, or (b) the persons by whom the relevant foreign duties (in respect of which such allowances were made under the said orders) fell to be borne, rateably according to the incidence upon those persons of the said foreign duties, or (c) the persons by whom the said British estate duty leviable in respect of the foreign assets fell to be borne (or would, in the absence of the said allowance fall to be borne), rateably according to the incidence upon those persons of the said estate duty; (6) the diminution in the amount of estate duty leviable under the law of Great Britain in respect of such of the foreign assets as were at the testator's death situated in the Province of Ontario, which arose by reason of succession duty paid in that province being allowed as a deduction in computing the value of those assets for the purpose of the said British estate duty, ought as between the several persons beneficially interested under the said will and codicil, to be treated in the same manner as the allowances in question 5, or in some other and what manner . . . (8) whether upon the true construction of the said will the "South African trustee securities" authorized by clause 5 thereof for the investment of the testator's residuary estate were: (a) securities for the time being regarded as suitable for the investment of trust money according to the practice of the courts of the Union of South Africa or any province thereof, or (b) securities of the Union of South Africa or any province thereof for the time being authorized by the law of England for the investment of trust money, or (c) some other and what class of securities.

[Argument was heard first on question 1.]

E. I. Goulding for the plaintiff.

L. H. L. Cohen for the pecuniary legatees. There is no specific direction in the will as to the payment of these foreign duties and the burden of them should be thrown on residue as part of the expenses of getting in those assets of the testator's estate and no part of them should be borne by the pecuniary legatees.

It was held in *In re Norbury*[1] that payment of foreign duties would not be included in a mere direction to give a legacy "free "of duty," and in such cases the only duties payable out of the estate would be the English duties. That case, strictly speaking, is on a different point, since it related to a will which contained a direction to pay legacies; there is no such direction here. But *In re Norbury*[1] makes it clear that unless the foreign duties be a testamentary expense they cannot be thrown on residue.

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[1] [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625.

The evidence discloses that South African estate duty and United States Federal estate tax are duties which by the law of those countries are thrown on residue, and there is no principle of English law which displaces that. The nature of Dominion succession duty was considered by Jenkins L.J. in *In re Goetze*,[2] where he stated that it was payable and recoverable from the executors, who had a right to deduct it in paying over the amount of the succession. The duties leviable by the Province of Ontario must by the law of the province be discharged before the estate can be handed over, although there is no personal liability on any person not residing in Ontario; these two duties are therefore part of the ordinary expenses in the administration of the estate.

In *In re Cunliffe-Owen*,[3] which was the first of the double taxation cases, it was argued that payment of duties which resulted in benefit to the estate should be borne by residue. No part of the foreign assets is specifically bequeathed by the will now before the court and payment of the duties must enure for the general benefit of the estate. It is therefore a testamentary or administration expense. The matter was taken a stage further in *In re Goetze*,[4] where Jenkins L.J. expressed the view that, irrespective of any directions in the will, and independently of the provisions of the Double Taxation Order, the Canadian succession duty might properly be regarded as part of the costs of getting in the estate: he said that that view was supported by *Peter* v. *Stirling*[5] and *In re Maurice*.[6] It was not necessary in that case for Jenkins L.J. to make any decision based on that reasoning as it would have led to the conclusion which he had already reached on other grounds. It is submitted that the point which Jenkins L.J. left open should be decided in the way that he there indicated.

T. L. Dewhurst for pecuniary legatees and persons interested in the income of residue supported the above argument.

Andrew Goodall for the infant beneficiary interested in capital in reversion. It is clear from *In re Cunliffe-Owen*[7] that the payment of United States Federal estate tax and South African estate duty is payable out of residue, and it is conceded that those duties are so payable. The position is not the same with regard to the duties of the Dominion of Canada and Province of Ontario. A statement in Green on Death Duties, 4th ed., p. 660, purports to draw a distinction between, on the one hand, duties in the nature of estate duty or probate duty, which are normally borne by residue, and, on the other hand, duties imposed on specific property comprised in a specific gift or duties imposed on the beneficiary which are borne by the beneficiary. There is no direction at all in this will to pay duties, and the foreign assets are not specifically bequeathed; one must therefore go to general principles.

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[2] [1953] Ch. 96; [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76.

[3] [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220.

[4] [1953] Ch. 96, 111, 112, 113.

[5] (1878) 10 Ch.D. 279.

[6] (1896) 75 L.T. 415; 18 T.L.R. 36.

[7] [1951] Ch. 964, 972.

In *In re Cunliffe-Owen* [8] it was held that a direction to pay death duties would include only United Kingdom death duties, and that the legacies would bear South African succession duty, Province of Quebec succession duty, and Dominion of Canada succession duty, but no other duties. On the authority of that passage it is submitted that the Province of Ontario and Dominion of Canada succession duty here should be thrown on the pecuniary legatees. The opinion expressed by Jenkins L.J. was purely obiter, and the point, as Jenkins L.J. said in the judgment, had not even been argued; it is not therefore binding on this court. *Peter* v. *Stirling* [9] and *In re Maurice* [10] were distinguished in *In re Scott*,[11] where French duties were thrown on the specific legatees and not on residue.

Cur. adv. vult.

October 21. DANCKWERTS J., having stated the facts, read the following judgment: The question which I have to decide is the effect of these duties on the beneficial interests created by the will and codicil. In the case of the South African and United States duties, the rate of duty depends on the aggregate dutiable estate, and the executor is liable for the duty which is borne primarily by the residuary estate, in the absence of some contrary provision in the will.

Normally, words exempting from death duties in an English will are confined to the duties imposed by British legislation, and do not extend to duties imposed by the laws of other countries: see *In re Norbury* [1] and *In re Cunliffe-Owen*.[2] And from the latter case it would appear that "testamentary "expenses" is not an apt phrase to describe duties leviable under the laws of other countries: see also *In re Scull*.[3]

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[8] [1951] Ch. 964.

[9] 10 Ch.D. 279.

[10] 75 L.T. 415.

[11] [1914] 1 Ch. 847.

[1] [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625.

[2] [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220.

[3] (1917) 118 L.T. 7.

There was no real dispute that the South African and United States duties resembled British estate duty in character and were payable out of the residuary estate.

The position as regards the duties leviable by the Dominion of Canada and the Province of Ontario provide more difficult questions. In a desire to save expense the plaintiff bank did not provide expert evidence of the nature of these duties, anticipating that the defendants might wish to file such evidence. The defendants, however, have not filed any evidence, and I am left with the summary of the effect of the duties contained in the affidavit of the manager of the plaintiff bank's executor and trustee department. Fortunately, the Dominion succession duty was considered by the Court of Appeal in *In re Goetze*,[4] and I have the benefit of a statement of the nature of the duty by Jenkins L.J. as follows[5]: "From the affidavit of a Canadian lawyer filed "in the present proceedings it appears: (1) that Canadian succes- "sion duty is assessed and chargeable on all successions on death "to Canadian property; (2) that for this purpose (so far as now "material) 'succession' means every disposition of property "whereby any person becomes entitled to any property or the "income thereof upon the death of any person; (3) that where "the deceased was at the time of his death domiciled outside "Canada the duty is exigible upon or in respect of the succession "to all property situated in Canada; (4) that the duty in respect "of any succession under the will of a testator is assessed at rates "varying with the aggregate net value of the Canadian property "passing on the death, and the relationship of the successor to "the testator, and that there are certain exemptions, one of which "frees successions less than $1,000 from the duty; (5) that the "successor is liable for the duty assessed in respect of any succes- "sion under the will of a testator but that such duty is neverthe- "less payable by and recoverable from the executors to the "extent of the property administered by them, with a right for "executors who are required to pay the duty to deduct it in "paying over the amount of the succession or to recover it from "the successor personally in the event of the succession being "satisfied otherwise than in money."

I think that I am entitled to take that as a fair statement of the nature of the Dominion succession duty. As regards the succession duty imposed by the Province of Ontario, counsel have provided me with the text of the Ontario Succession Duty Act, as revised and consolidated in 1950. I find that by section 5, subject to the exemptions contained in sections 3 and 4, on the death of any person whether he dies domiciled in Ontario or elsewhere, where any property situate in Ontario passes on his death, duty is to be levied on such property in accordance with the dutiable value thereof. Under section 6 the rates of duty vary according to the aggregate value of the estate and according to the relationship of the person to or for whose benefit the property passes, i.e., whether lineal relatives, collaterals, or strangers in blood. I observe that by section 8 an allowance is to be made for estate, agency or succession duty payable in any jurisdiction designated by the Lieutenant-Governor in Council. By section 9, on the death of any person, whether he dies domiciled in Ontario or elsewhere, unless the consent in writing of the treasurer is obtained, no bank, trust company, insurance company or other corporation having its head office, principal place of business, office from which payments are made, register of transfers, or any place of transfer, in Ontario may deliver, assign, transfer or pay, or permit the delivery, assignment, transfer or payment of any property situate in Ontario in which the deceased at the time of his death had any beneficial interest, and penalties are imposed for breach of this provision.

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[4] [1953] Ch. 96; [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76.

[5] [1953] Ch. 96, 104.

By section 11 every person resident in Ontario at the date of death of the deceased to whom or for whose benefit any property in Ontario passes on the death of the deceased is liable for the duty levied on the proportion of such property which so passes to him or for his benefit, together with such interest as may be payable thereon. By section 19, where any duty is levied on property passing on the death of the deceased, such duty or so much thereof as remains unpaid, with interest thereon, is to be and remain a first lien and charge on such property until paid or a certificate is given discharging such property. It is provided by section 24 that an executor or trustee, as such, shall not be personally liable for any duty, but an executor, trustee or person in Ontario in whom any property passing on the death of the deceased is at any time after the death of the deceased vested, or who has the management or control thereof, shall not transfer any such property to the person beneficially entitled thereto without deducting therefrom or collecting an amount sufficient to pay the duty and interest payable by such person.

There does not appear to be any personal liability for duty under the statute on any person who is not resident in Ontario.

I apprehend that in the case of non-residents the security for the payment of the duty is provided by section 9 (prohibition of transfers), and section 19 (lien on the property), particularly as the treasurer has power under section 31 to put a stop order by writing or telegram on any property or evidence of title which he believes is about to be removed from Ontario without provision for the duty payable.

In *In re Goetze* [6] Jenkins L.J. refers to a suggestion that, irrespective of any special direction in the will, and independently of the provisions of the Double Taxation Order, the Canadian succession duty might perhaps properly be regarded simply as part of the cost of getting in the Canadian estate, and as such falling on residue generally. This point appears not to have been put forward at all in *In re Cunliffe-Owen*,[7] and apparently it was thought unnecessary to present an argument on it in *In re Goetze*.[8] But it seems to me an attractive method of disposing of the matter, and Jenkins L.J., discussing it in *In re Goetze*, said [9]: "This is not a case of a specific gift of property situated "in a foreign country and attracting duty by virtue of the laws "of that country, or a gift to a legatee domiciled or resident "abroad which attracts duty in the hands of the legatee under "the law of his or her domicile or place of residence. It is "simply a case in which property situated in Canada has passed "under a general residuary devise and bequest in the English will "of a testatrix domiciled and resident here, and in which this "country is the appropriate forum of administration. The "residue, including the Canadian estate, is given upon the usual "trusts for sale and conversion and payment of funeral and "testamentary expenses and debts and pecuniary legacies and "annuities and the United Kingdom duties thereon, and subject "to these payments in trust for the respondent residuary legatee. "To get in the Canadian estate and make it available for applica- "tion as above, the executors had to pay the estate duty on the "Canadian property. It is true that under the law of Canada "the duty in question was assessed on the beneficial interests, "and according to that law would fall ultimately to be borne by "the beneficiaries concerned, the extent of their beneficial "interests in the Canadian estate being ascertained by treating "them as provided rateably out of the net Canadian and English "estates, and the rates of duty varying with the relationship of

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[6] [1953] Ch. 96, 111.

[7] [1951] Ch. 964.

[8] [1953] Ch. 96.

[9] Ibid. 111, 112, 113.

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SEBBA, DECD., *In re.*

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"the beneficiaries to the testatrix. But it does not necessarily "follow that these features of the Canadian fiscal law, involving "as they do a wholly artificial apportionment of debts and "benefits as between the Canadian and English estates, should "be imported into an English administration, and the alternative "course of treating the amount of the Canadian duty simply as "part of the cost of getting in the Canadian estate, without "regard to the peculiarities of the local law as to mode of assess-"ment and incidence, would certainly have the merit of "simplicity. The possible view to which I am now calling "attention is supported by *Peter* v. *Stirling*[10] and *In re* "*Maurice*,[11] and particularly the latter case, where an Australian "duty assessed by reference to the ages of the beneficiaries was "held payable out of the estate as a whole and not out of the "respective interests of the beneficiaries in accordance with the "amounts assessed upon them in Australia. These two cases "were distinguished by Swinfen Eady J. in *In re Brewster*,[12] "which was a case of a specific devise, on trusts separate from "those of the residuary estate, of land in Melbourne, Victoria, "Australia, in which it was held that the local death duties and "other costs of realizing the Melbourne property fell on that "property and not on residue. *Peter* v. *Stirling*[13] was also dis-"tinguished by Warrington J. in *In re Scott*,[14] where it was held "that the French mutation duty on chattels situated in France "should be borne by the specific legatees thereof and not by "residue; and Warrington J.'s decision was upheld in the Court "of Appeal. But there is nothing in the judgment of Swinfen "Eady J. in *In re Brewster*[15] or of Warrington J. or the Court "of Appeal in *In re Scott*[16] to suggest that *Peter* v. *Stirling*[17] "and *In re Maurice*[18] were wrongly decided. On the contrary, "Warrington J.'s explanation in *In re Scott*[19] of the ratio "decidendi in *Peter* v. *Stirling*[20] seems to me to bring it fairly "close to the present case, and his judgment was affirmed with-"out qualification in the Court of Appeal. As the point has not "been argued in the present case, and if made good would lead "to the same conclusion as I have reached on other grounds, I

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[10] (1878) 10 Ch.D. 279.

[11] (1896) 75 L.T. 415; 18 T.L.R. 36.

[12] [1908] 2 Ch. 365.

[13] 10 Ch.D. 279.

[14] [1914] 1 Ch. 847.

[15] [1908] 2 Ch. 365.

[16] [1914] 1 Ch. 847; [1915] 1 Ch. 592; 31 T.L.R. 227.

[17] 10 Ch.D. 279.

[18] 75 L.T. 415.

[19] [1914] 1 Ch. 847, 854, 855.

[20] 10 Ch.D. 279.

"express no opinion about it one way or the other, but merely "refer to it lest this judgment, which is framed in accordance "with the arguments presented, should be regarded as implicitly "concluding it if raised in any future case."

The facts in the present case are similar to the situation described by Jenkins L.J. in *In re Goetze.*[21] *Peter* v. *Stirling*[22] and *In re Maurice*,[23] I would add, seem to me to support entirely the view put forward by Jenkins L.J. It is quite clear that in *In re Brewster*[24] Swinfen Eady J. did not cast any doubt upon the correctness of the decisions in those two cases. He pointed out that in the case[25] before him the contest was between a specific devise and residue, a situation which is different from that in the present case. Similarly, in *In re Scott*[26] (affirmed in the Court of Appeal[27]), the contest was between the specific legatee of valuable tapestries attached to the walls of the testator's house in Paris and those interested in the residuary estate; and the evidence of French lawyers was that in France executors were ignored and the beneficiary was the person liable for the duty and to whom the authorities looked for payment thereof. Warrington J. held that the French mutation duty had to be borne by the specific legatee as it was a debt due by the legatee, which the executors had paid on her behalf, and, therefore, distinguishable from the duties in *Peter* v. *Stirling*,[28] which were part of the expenses which had to be incurred by the executors in getting in and transmitting to this country the Australian assets. In the present case no part of the assets in Ontario have been specifically bequeathed. They are part of the general residuary estate out of the whole of which the pecuniary legacies have to be paid, and the ultimate residue of which is divisible amongst the residuary legatees in the manner directed by the testator.

The position in the case of the Ontario duty is really even clearer than in the case of the duty levied by the Dominion of Canada. In the case of the Ontario duty there appears to be no personal liability on any person who is not resident in Ontario. The position is that any transfer of the property situate in the province is held up, and a lien for the amount of the duty is imposed until payment of the duty is made to the treasurer. Consequently, the executor is faced with the necessity of paying the duty in order to free the assets of the estate situate in the

[21] [1953] Ch. 96.
[22] 10 Ch.D. 279.
[23] 75 L.T. 415.
[24] [1908] 2 Ch. 365.
[25] Ibid. 368.
[26] [1914] 1 Ch. 847.
[27] [1915] 1 Ch. 592.
[28] 10 Ch.D. 279.

province and collect them for the purposes of the administration of the estate. In the case of both the Dominion duty and the duty imposed in the Province of Ontario, it seems to me that the duties are expenses of getting in the testator's estate, and are not expenses of getting in any asset which is the subject of a specific bequest. A similar result was reached in respect of succession duty payable to the Dominion and Provincial Governments of Canada in *In re Blake*,[29] where the English cases are discussed.

In my view, all the duties mentioned in question 1 of the originating summons are payable out of the general residuary estate of the testator as expenses of getting in the assets situate in the countries concerned.

[His Lordship made a declaration on question 1 in the terms of alternative (a); and in the circumstances question 2 did not arise. On questions 3 and 4 his Lordship made the following declarations respectively:] (3) That the pecuniary legacies ought to bear such rateable part of estate duty leviable in respect of the overseas estates under the law of Great Britain, and any interest payable in respect of such duty as was attributable to the said legacies respectively in due course of administration pursuant to clause 5 of the will; (4) that the rateable part of the duty must be borne by the beneficial interests under clause 4, and secondly, that the capital amount of the fund to be set aside under clause 4 of the will should be reduced in like manner with the other pecuniary legacies, and the income of the reduced fund paid to the defendant Winifred Birtwell.

[The argument on questions 5, 6 and 8 appears sufficiently from the judgment.]

DANCKWERTS J. Question 5 seems to me to be covered by the statement of Jenkins L.J. in *In re Goetze*,[30] where he says[31]: "It was not, I think, disputed that if there had been no special "directions at all in the will concerning death duties, so that each "of the pecuniary legacies and annuities had to bear its due proportion of the United Kingdom estate duty attributable to the "Canadian estate" which is the situation in the present case, "the credit against such United Kingdom estate duty secured "under article 5 of the Double Taxation Order by payment out of "each pecuniary legacy or annuity of its due proportion of the "Canadian succession duty would have enured for the benefit of

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[29] [1955] I.R. 89, 108, 110.

[30] [1953] Ch. 96.

[31] Ibid. 109, 110.

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"the pecuniary legatee or annuitant concerned (which appears "to have been the effect of the decision in the second judgment in "*In re Cunliffe-Owen*)."[32] That would seem to me to apply in the present case. I answer question 5 in the alternative, that the credits in the case of all four duties enure for the benefit of the persons by whom the British estate duty leviable in respect of either of those duties falls to be borne rateably according to the incidence upon those persons of the British estate duty.

Question 6 relates to the amount of Ontario succession duty which is allowable by the Inland Revenue in respect of estate duty payable in England, as if it were a debt deductible from the property in Ontario, and that became valued for the purposes of estate duty. The question is, who gets the benefit of that deduction to some extent of estate duty.

The matter seems to have been dealt with by Wynn-Parry J. in *In re Cunliffe-Owen*,[33] where he said[34]: "The only other duty "in respect of which I heard argument was South African succes- "sion duty. The position as regards this duty is different from "that as regards Canadian succession duty, in that there is no "double taxation relief agreement covering South African "succession duty." In the present case that is the position as regards the Ontario duty. "Nevertheless, the Inland Revenue, "by way of concession, allow the amount exigible in respect of "South African succession duty to be deducted from the value "of the South African personalty; that is, they allow that duty "to be treated as a debt. According to the expert evidence, "South African succession duty assessed in respect of any succes- "sion is payable by the successor, and if paid by the executors is "recoverable by them from the successor. No part of the duty is "payable ultimately out of the residuary estate. The duty is "assessed at rates varying with the relationship of the successor "to the testator. The question therefore arises how the amount "of South African succession duty allowed by way of the conces- "sion to which I have referred should be apportioned. In my "judgment, the same reasoning should apply as in the case of "the credit given in respect of Canadian succession duty. Mr. "Comber will be entitled to share in the amount of such conces- "sion on a similar formula to that which I have already indicated, "and the residuary legatees will be entitled to have the remainder "apportioned between them according to their respective

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[32] [1951] Ch. 964.

[33] Ibid.

[34] Ibid. 978.

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"interests in the residuary estate." It seems to me that the effect of that is, as contended for by Mr. Cohen, consistent with the principle adopted in the present case; in other words, those who have to bear the proportion of the burden of the British estate duty should also receive the benefit of the proportion of the concession made by the Commissioners of Inland Revenue.

In question 8 the point that I have to decide arises from the direction contained in clause 5 (b) of the will: "To "invest the residue of such moneys in South African trustee "securities only with power to vary such investments for others "of a like nature" as respects the trust fund. It appears that there are a very limited number of South African loans and stocks which come within investment allowed by the Trustee Act, 1925, which in England governs the investment of trust funds; but in South Africa there is no corresponding statutory provision defining in what funds trustees may invest. It is stated in this way in the affidavit sworn on behalf of the plaintiff bank: "The plaintiff company are advised by their correspondents in "the Union of South Africa that there is no statutory provision "in force in that country governing the investment of trust "money and that in practice subject to the express provisions "of the trust instrument and to any equitable principles affecting "the particular case the following classes of securities are "regarded as suitable for such investment, namely, (i) local issues "of Government and leading municipal stocks, (ii) first mortgage "bonds on property in the Union, (iii) stocks of certain public "utility corporations in the Union, and (iv) certain landed "property in the Union"

It would seem to me absurd to think that the testator should have intended to limit the investments by his trustees to those very limited investments in South Africa which come within section 1 of the Trustee Act, 1925, having particular regard to the fact that he has directed in clause 8 that his residuary trust fund shall be transferred when the administration is complete to the Standard Bank of South Africa at its offices in South Africa, and having regard also to the fact that the beneficiaries all reside in South Africa. Some help may be gained from the gift to the annuitant who resides in England, in which case the fund is directed to be appropriated in English investments. Accordingly, I come to the conclusion that the wider meaning must be given to the phrase used by the testator in clause 5 (b), and that meaning must be to invest in such forms of investment as are regarded by the courts of South Africa or any province thereof as suitable for investments of trust funds.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Co. for Preston & Redman, Bournemouth; Bristows, Cooke & Carpmael; Bentleys, Stokes & Lowless; Theodore Goddard & Co.*

I. G. R. M.

PHILLIPS *v.* PRICE.

[1957 P. 2158.]

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Harman J.

Landlord and Tenant — Repairs — Act of 1938 *— Leave to proceed for possession—Breaches of covenants to repair—Application by lessor for leave to proceed in claims for forfeiture and damages—Matters to be proved to obtain such leave—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (1) (3)*—Leasehold Property* (*Repairs*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 (1) (5) (*as amended by the Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 51).

Statute—Construction—Alternative or collective provisions—Proof of "a, b or c"—Whether a and b collective or alternative—Meaning of "or"—Leasehold Property (*Repairs*) *Act,* 1938, *s.* 1 (5).

A., the first respondent, in 1937 acquired a lease for 80 years from 1882 of a slum tenement in Southwark, and in February, 1956, assigned it to the second respondents, the C. Co., of which he was secretary. The lease contained a covenant by the lessee to repair and a proviso for re-entry on breach of any covenant. In 1954 P. bought the reversion for £275 and in 1955 he served A. with a notice to repair pursuant to section 146 of the Law of Property Act, 1925,[1]

[Reported by Miss Margaret Thomas, Barrister-at-Law.]

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[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or stipu-"lation in a lease for a breach of any "covenant or condition in the lease "shall not be enforceable by action "or otherwise, unless and until the "lessor serves on the lessee a notice—"(*a*) specifying the particular breach "complained of; and (*b*) if the breach "is capable of remedy, requiring the "lessee to remedy the breach; and "(*c*) in any case, requiring the lessee "to make compensation in money for "the breach; and the lessee fails, "within a reasonable time thereafter, "to remedy the breach, if it is capable "of remedy, and to make reasonable "compensation in money, to the satis-"faction of the lessor, for the breach.
"...

"(3) A lessor shall be entitled to "recover as a debt due to him from a "lessee, and in addition to damages "(if any), all reasonable costs and "expenses properly incurred by the "lessor in the employment of a solici-"tor and surveyor or valuer, or other-"wise, in reference to any breach "giving rise to a right of re-entry or "forfeiture which, at the request of "the lessee, is waived by the lessor, "or from which the lessee is relieved, "under the provisions of this Act."

to which A. replied with a counter-notice under section 1 (1) of the Leasehold Property (Repairs) Act, 1938.[2] In October, 1956, P. served a similar notice upon the C. Co., to which they replied with a counter-notice, and they executed a few minor repairs. In April, 1957, the London County Council declared the area in which the property was situated to be a clearance area, and in November followed this by a compulsory purchase order which was awaiting confirmation at the date of the hearing. P. applied to the court for leave to bring proceedings against the C. Co. for possession of the property.

The evidence was that the premises were antiquated and undesirable by modern standards, but that the respondents had allowed them, in breach of the repairing covenants, to fall into a very bad state of disrepair.

On a preliminary question whether, in order to obtain leave to proceed, a lessor had to establish to the satisfaction of the court the requirements of each of paragraphs (*a*), (*b*), (*c*), (*d*), of section 1 (5) of the Act of 1938, if he could not establish paragraph (*e*), or whether the four paragraphs were alternative:—

Held, that the paragraphs were alternatives, so that if a lessor could establish one of them or (*e*) to the satisfaction of the court, there was jurisdiction to grant leave to proceed.

On the facts of the case:—

Held, (1) that there was nothing in the facts, including the existence of the compulsory purchase order, to justify the court in holding that there were any "special circumstances" under paragraph (*e*) in the case of such a speculative purchase of bad property; (2) that the breaches of the repairing covenants were such as to establish a case under paragraphs (*a*) and (*c*); (3) that in all the circumstances, it was right that the discretion of the court should be exercised to grant the lessor the right to proceed, as the breaches of the repairing covenants had damaged the value of the reversion, and it might be proved in the ensuing action that such breaches would substantially affect the amount paid to the lessor under the compulsory purchase order.

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[2] Leasehold Property (Repairs) Act, 1938, s. 1, as amended by the Landlord and Tenant Act, 1954, s. 51: "(1) Where a lessor serves on a "lessee under section 146 (1) of the "Law of Property Act, 1925, a notice "that relates to a breach of a cove"nant or agreement to keep or put in "repair during the currency of the "lease all or any of the property "comprised in the lease, and at the "date of the service of the notice "three years or more of the term of "the lease remain unexpired, the "lessee may within twenty-eight days "from that date serve on the lessor a "counter-notice to the effect that he "claims the benefit of this Act. . . .

"(5) Leave for the purposes of this "section shall not be given unless the "lessor proves—(*a*) that the imme"diate remedying of the breach in "question is requisite for preventing "substantial diminution in the value "of his reversion, or that the value "thereof has been substantially "diminished by the breach; (*b*) that "the immediate remedying of the "breach is required for giving effect "in relation to the premises to the "purposes of any enactment, or of "any byelaw or other provision "having effect under an enactment, "or for giving effect to any order of "a court or requirement of any "authority under any enactment or "any such byelaw or other provision "as aforesaid; (*c*) in a case in which "the lessee is not in occupation of the "whole of the premises as respects "which the covenant or agreement is "proposed to be enforced, that the "immediate remedying of the breach "is required in the interests of the "occupier of those premises or of part "thereof; (*d*) that the breach can be "immediately remedied at an expense "that is relatively small in compari"son with the much greater expense "that would probably be occasioned "by postponement of the necessary "work; or (*e*) special circumstances "which in the opinion of the court, "render it just and equitable that "leave should be given."

ADJOURNED SUMMONS.

The subject-matter of the application, a tenement property consisting of 12 flats and known as Garfield House, Mardyke Street, Southwark, was subject to a lease made on May 1, 1883, granted for a term of 80 years from Michaelmas, 1882, at a yearly rent of £26. The lease contained a covenant by the lessee to repair, and a proviso for re-entry on breach of any covenant. The lease was assigned to the first respondent, Arthur Roland Price, on August 23, 1937, and he assigned it to the second respondents, the present lessees, Crosslet Properties Ltd., of which he was secretary, on February 21, 1956. On November 12, 1954, when the lease had eight years to run, the freehold was conveyed to the present lessor, the applicant, Sampson Phillips, for £275. Garfield House had since 1936 been slum property and was in a slum area.

The lessor instructed surveyors, who drew up a heavy schedule of dilapidations amounting to about £5,000, and on April 1, 1955, his solicitors served a notice of repair pursuant to section 146 of the Law of Property Act, 1925, upon Price, who replied with a counter-notice under section 1 of the Leasehold Property (Repairs) Act, 1938, claiming the benefit of that Act. On March 10, 1956, the lessor received notice of the assignment by Price to the present lessees, and on October 15, 1956, he served a notice of dilapidations on them, to which they replied with a counter-notice. The lessor's surveyor found, when he visited the premises in May, 1957, that only an insignificant part of the repairs had been done by the lessees, while the sublessees had done some minor repairs at their own expense. The company continued to collect the rents of the 12 flats, which were between £20 and £40 a year. The building still remained dilapidated, damp, and insanitary, but no sanitary notices were ever received. At the date when the lessor acquired the freehold it was known that the London County Council were proposing to develop the area. In April, 1957, they declared it to be a clearance area, and on November 20, 1957, this was followed by a compulsory purchase order pursuant to section 43 of the Housing Act, 1957. The order at the date of the hearing was awaiting confirmation by the Minister.

The lessor now applied to the court for leave to bring proceedings against the lessees for the possession of the property, and against the lessees and their assignor for damages for breaches of covenant to repair, and claimed the benefit of section 146 (3) of the Law of Property Act, 1925, in respect of his costs and expenses. The respondents raised a preliminary point that a lessor, in order to obtain leave to bring an action under section 146 of the Act of 1925, must satisfy the court under each of paragraphs (*a*), (*b*), (*c*), (*d*), of section 1 (5) of the Act of 1938 if he could not do so under paragraph (*e*).

F. Bower Alcock for the respondents. Paragraphs (*a*), (*b*), (*c*), (*d*) are cumulative, since there is no " or " after (*a*), (*b*) and (*c*), and the lessor—on whom the burden of proof lies—must satisfy the requirements of each and every one of them if he cannot bring his case within paragraph (*e*). Since " or " appears only after (*d*) the landlord must prove paragraphs (*a*)–(*d*) inclusive, or alternatively (*e*), before the court will consider granting leave. Where Parliament intends that subsections are to be alternative it says so, as in sections 54 and 63 of the Housing Act, 1957.

D. Gidley Scott for the applicant lessor. The paragraphs are alternative according to the ordinary meaning of the words. To reject this construction would only raise a further ambiguity. The subsection might then mean, on the one hand, either (*a*), (*b*), (*c*), (*d*) collectively, or alternatively, (*e*) instead of them, or, on the other hand, (*a*), (*b*), (*c*) in any case and in addition either (*d*) or (*e*). If the paragraphs were cumulative, then a lessor would have to prove (*b*) in every case except, possibly, where (*e*) was proved. This would prevent the lessor from obtaining leave if the breach of covenant did not give rise to a breach of the provisions of a statute or by-law, and this would be an injustice. It may be so clear from the sense that Parliament intends subsections to be alternative that it is unnecessary to indicate it in the wording, as in section 222 of the Companies Act, 1948.

HARMAN J. This is a preliminary point of law concerned with what is required of the landlord to bring himself within the bounds of this, I must say, strange statute. The Act was passed in 1938, and was called the Leasehold Property (Repairs) Act. Its intention was to restrict the rights of a landlord to enforce the covenants by the lessee in the lease, primarily obligations to repair, but not solely, by any means. It provides that where the usual notice is served by a landlord under section 146 of the Law of Property Act, 1925—the notice which is a prerequisite in nearly every case to an action for forfeiture—then the lessee may serve a counter-notice that he desires to obtain the benefit of this Act. This was restricted in the original Act to a period of more than five years before the end of the term, but was cut down in 1954 by the Landlord and Tenant Act to three years. It applied originally to what were called "long leases," that is to say, 21 years or more, that being apparently the legislature's view of a long lease. That was cut down to seven years, so that now, if there be more than three years to run of a total term of seven years, the landlord has to get over the extremely high fences which this Act sets up before he may even start to bring his action to enforce his rights.

It is not for me to comment on the justice of that. What I am confronted with is the conditions on which leave may be granted or withheld. That, again, is couched in negative terms. It does not permit the court to give leave wherever it finds certain circumstances. It says: "Leave shall not be given unless"—and the burden of proof is put on the landlord. Section 1 (5) reads: "unless the lessor proves" and then there are set out paragraphs (*a*), (*b*), (*c*), (*d*), (*e*). Between (*d*) and (*e*) there is the word "or"; otherwise (*a*), (*b*), (*c*), (*d*) are merely separated by a semi-colon in each case. Thus, leave shall not be given unless the landlord proves (*a*) that so-and-so, (*b*) that the other, (*c*) that the third, (*d*) that the fourth, or (*e*) special circumstances. In my opinion, those special circumstances are a general alternative to the rest of the section.

It is said with a great deal of cogency by Mr. Alcock that (*a*), (*b*), (*c*), (*d*) are not couched in any alternative form at all; and that it is necessary, if you cannot get yourself within the special circumstances set out in (*e*), for you to prove the whole of (*a*), (*b*), (*c*), (*d*), because there is no alternative word between them. This, I must say, is a blot on the draftsmanship. I should have thought that it was of the first necessity that the legislature should make it plain whether the paragraphs are alternative or collective. It has not done so. It has put in one alternative at the end of the fourth of the paragraphs; that makes the fifth either alternative to the fourth, or alternative to all the preceding ones.

It was also the alternative suggestion, in this state of things, that as there is no "or," and as the prohibition is on the landlord "unless [he] proves" as follows, the right view is that he must prove them all, and to this view I was at one time inclined. But I have changed my mind, because when I look at the section I find that (*a*), for instance, and (*b*) contain within themselves alternatives, and each one of them, I think, is intended to provide a category in itself; that is to say, the landlord must prove either what is in (*a*) or what is in (*b*) or what is in (*c*) or what is in (*d*). The court is not bound even then to give him any relief, but it cannot give him any "unless [he] proves," whatever that may mean (and that I have not yet considered), the matters stated in one at least of the paragraphs.

It seems to me that the conclusive argument about the alternative view is to be found in (*b*), because there you have to bring yourself within statutory requirements, and it would follow that where no statute came into the picture, a landlord could never get any leave to enforce his rights; and that seems to me to be so unjust that it is an intention not to be imputed to the legislature unless I must. I do not think I need, and I am not inclined to do so.

Accordingly, I hold that it is enough for the landlord to bring himself within (*a*) or (*b*) or (*c*) or (*d*) or (*e*), and that if he does so, it will then be for me to consider whether I ought to give him leave to start proceedings.

Consideration was then given to the facts of the case.

Scott. Paragraph (*e*) is satisfied as there are special circumstances (1) in the existence of the compulsory purchase order, since if this is confirmed, the London County Council will only pay for the value of the site as a cleared site, and the state of the property has been brought about by the default of the respondents, and (2) because the first respondent has assigned to the second respondent obviously with a view to avoiding liability. Paragraph (*a*) is satisfied because the value of the reversion has been diminished by the breach; paragraph (*b*) is satisfied as the breach should be remedied in order to satisfy the various statutory provisions and regulations in connexion with repair, maintenance and sanitary notices; and paragraph (*c*) is satisfied as it is in the interests of the occupiers that the breach should be remedied.

Alcock. As to paragraph (*e*), anyone buying property of this sort must contemplate the possibility of a clearance order. As to paragraph (*a*), even if the property had been kept in good repair, site value only would have been paid. The property is in a slum area, the lease has only some four or five years to run and, in any event, the landlord would not spend money on repairs of this sort of property. Damages for breach of covenant to deliver up in good repair must be assessed as at the date of termination of the lease: *Smiley* v. *Townshend*.[1] The value of the landlord's interest at the end of the lease could not have been diminished by the breach. Where it is plain that repairs are not going to be done by a landlord the cost of them is little or no guide to the diminution in value of the reversion: *Espir* v. *Basil Street Hotel Ltd.*[2] As to paragraph (*b*), there is no evidence of any complaint by any authority. The applicant cannot bring himself within paragraph (*c*) in view of the compulsory purchase order. The acceptance of rent was an equivocal act affirming the existence of the lease, and the landlord has waived his right to forfeiture: *Creery* v. *Summersell and Flowerdew & Co. Ltd.*[3]

HARMAN J. This is an originating summons under the Leasehold Property (Repairs) Act, 1938. [His Lordship stated the facts substantially as set out above, and continued:] I have already decided that what has to be shown by the applicant is that one or other of the matters set out in section 1 (5) of the Act is present here; and the applicant says that he is in a position to prove several of them. First, he says, as regards the last paragraph, that there are special circumstances here which render it just and equitable that he should have leave. The special circumstances put forward are, first, the existence of the compulsory purchase order. The effect of that, if confirmed, would be that the property will be acquired by the London County Council, who will have to pay for it the value of the site only as a cleared site, a value which appears to be somewhere in the region of £250. It is said that that state of things has been brought about by the default of the respondents, and that, therefore, it is just and equitable that the applicant should exercise his rights, because otherwise he will not even be able to save out of the wreck the whole of the compensation which will become payable. The objection taken to that is that anyone buying property of this sort must contemplate the possibility of clearance orders and compulsory purchase, and that is one of the risks that a speculator takes. In my judgment, that point is a good one. I do not think that is a special circumstance.

Then it is said that it was a special circumstance that the first respondent had assigned to this company obviously with a view to avoiding liability so far as he could. It is well known that people of this sort always resort to this kind of expedient, and I do not think that is a special circumstance at all. If the only question before me were whether it was just and equitable that the action should be brought, I should say that it was, but that is not what the section says. I do not see any special circumstances under (*e*) here, and the applicant, therefore, must rely on (*a*), (*b*), (*c*) or (*d*). He does not say that he can rely on (*d*), so that leaves (*a*), (*b*) and (*c*).

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[1] [1950] 2 K.B. 311; 66 T.L.R. (Pt. 1) 546; [1950] 1 All E.R. 530.

[2] [1936] 3 All E.R. 91.

[3] [1949] Ch. 751.

The part of (*a*) relied on is that the value of the reversion has been substantially diminished by the breach. That is one thing. Under (*b*) it is said that the breach ought to be remedied in order to satisfy the various statutory provisions and regulations in connexion with repair, maintenance or the sanitary condition of houses. Thirdly, it is said, under (*c*), that it is in the interests of the occupiers that the breach should be immediately remedied.

As to (*a*), I am of opinion that the applicant proves his case. It is admitted that there have been wholesale breaches of the repairing covenants; the applicant says £5,000 worth—even the respondents agree £2,500 worth. No attempt has been made to keep this property in the state in which the tenant is bound to keep it. The first respondent has simply taken his rent and done as little as he can. It seems to me clear that this property in good repair must be worth more than in its present state. But it is said that this is a property on which a compulsory purchase order has been made, and site value only will be paid, and that the same thing would have happened if the property had been kept in apple-pie order throughout the term of the lease. I do not accept that at all. It seems to me ridiculous to say that it would have made no difference if the London County Council surveyors had come along and found this property was in first-class repair, even though the other properties in the road were not. In that case, two things might have happened: either it might have been excluded from the clearance area, in which case market value would have been paid for it, or it might have been entitled to some ex gratia payment so-called. In my view, the words "unless [he] proves" cannot mean more than that the court, on balance of the evidence, is persuaded, and would accept it as proved in a civil action; and I prefer the evidence of Davis, the applicant's surveyor, on this part of the case to that of Stimson, the respondents' surveyor, who merely says, in a vague and completely general way: "I am of opinion that even if Garfield

"House had been maintained in proper condition to the fullest "extent required by the covenants of the lease, the bad arrangement and age of the property would have rendered it just "as unfit for human habitation as it is now." The age of the property has nothing to do with it being unfit for human habitation. If one looks at section 4 of the Housing Act, 1957, which defines what is to be looked at when considering fitness for human habitation, one does not find anything about age. Nor, indeed, does one find anything about bad arrangement. Bad arrangement can be made a reason for making a compulsory purchase order, and declaring the property to be part of a clearance area, apart from the conditions set out in section 4 (1) of the Act of 1957. The first of the conditions in section 4 (1) is "repair," and I cannot think that bad arrangement is the principal matter when this property is said to be in an insanitary condition, damp, ill-ventilated, and with everything wrong with it, because the covenants in the lease have not been observed. That is the evidence of Davis, and a mere ex cathedra statement on the other side that bad arrangement would have produced the same effect does not seem to me to carry much weight.

Davis's evidence was that these were very bad flats. They were built in 1882, when ideas about housing were very different from what they are today. They have no bathroom, they have no larder, but otherwise they seem to me, on his evidence, a quite adequate kind of tenements. I cannot believe that the absence of a bathroom and the absence of a ventilated larder alone are sufficient to induce local authorities in these days to declare a flat unfit for human habitation. They are undesirable features, no doubt, and not in accordance with modern practice, but they are features which exist in the vast majority of houses in this country, I venture to say.

Therefore, it seems to me that the applicant has succeeded in proving that which is required under the first paragraph.

When I look at (*b*), that depends on a very general statement by Davis that many of the details in his schedule of dilapidations ought to be done in order to give effect to the provisions of the Public Health (London) Act, 1936. But he does not condescend to any detail, or to anything more than a very vague statement about that, and I do not think I ought to take any notice of such a statement, especially having regard to the fact that if there is no immediate remedying of the breach, that no doubt will go on year after year; and so far as I know on the evidence before me, those who have the duty of enforcement of the by-laws have not complained. Therefore, I do not think that the applicant satisfies (*b*).

As to (*c*), again the matter depends on a statement made by Davis. He says that it would be in the interests of the occupiers that these breaches should be remedied. True again, that is only a rather vague statement; but it appears to me that the thing speaks for itself. Quite clearly, it is to the advantage of the occupiers that breaches of this sort should be remedied—matters such as leakage from water closets in a flat on one floor flowing down into the flat on the next floor, and so forth. A standard of repair far higher would clearly be in the interests of the occupiers, that is to say, of the 12 tenants of the 12 rent-restricted flats. Consequently, I think that (*c*) also is satisfied.

If that is so, then I have a discretion—I am not bound—to give the landlord leave to sue, a discretion which entitles me to give him leave if I think fit; and, in my judgment, he certainly ought to be given leave. After all, the lessee originally covenanted to do all these things, and got possession of the property upon that footing, and exacted the rack-rent, paying a ground rent and electing to perform his covenanted obligations. Why should the landlord not be entitled to his covenanted rights, whatever they are, because the statute passed with a view to preventing some oppression, which is not clear to me, says that certain things must be proved to the court before such an action is begun? If they are proved, I cannot see why I should interfere further with the freedom of contract which landlords, to some small extent, still do retain.

Then it is said that there is no damage to the reversion because nobody supposes that if the landlord receives a sum of money, he would apply it to the doing of these repairs. Of course he will not, for under a compulsory purchase order the whole property is going to be swept away. But the question at issue in an action of this sort is the damage to the reversion; and the damage to the reversion which, in my judgment, has to be proved is that there would be a substantial difference between what the London County Council may be made to pay for the property, or the site as it is, and as it ought to be. How much that may be, I have no idea, and I do not propose to interfere with the trial judge by suggesting it. Consequently, I think that it is not true to say that there is no damage to the reversion.

Lastly, it is said that there is a waiver of the forfeiture by acceptances of rent. That does not seem to me to have anything to do with me on this application, and I say nothing about waiver or no waiver. I cannot feel that the fact that the forfeiture part of the action might fail against the second respondent is material. The applicant might nevertheless recover damages in respect of breaches from the first respondent or from the second respondent. The reversion has been damaged prima facie anyhow, notwithstanding (if it be the fact) that the landlord has put himself out of his right to have a forfeiture for the continuing breaches which he has proved. So I shall leave that question to be decided in the action. I make no prophecy at all whether the applicant will be successful. But the applicant having, as I say, satisfied the burden which the 1938 statute puts upon him, I do not see why he should not be free, if he chooses, to put his fortunes to the test.

Consequently, I propose to make a declaration that the applicant shall have leave to proceed, and also I shall declare that the applicant shall be entitled to such benefit from subsection (3) of section 146 of the Law of Property Act as may be decided by the judge at the trial of the suit, that being also a requirement of the Act of 1938.

As to the costs, I shall say that the applicant shall have the costs of his application as though they were his costs in the action; that is to say, if he succeeds in the action, he will get the costs of this application also. If he does not succeed in the action, he will not have to pay any, but he will not get any. This being really in the nature of an interlocutory application, that seems to me to be the right course.

Declaration accordingly.

Solicitors: *Kingsley Wood & Co.; Bonwick & Co.*

In re ROYCE'S WILL TRUSTS.
TILDESLEY *v.* TILDESLEY AND OTHERS.

1958
Nov. 5.
Wynn-Parry J.

[1956 R. No. 2189.]

Will—Attestation—Trustee—Provisions in will for remuneration of trustee and solicitor—Attesting witness subsequently appointed trustee—Whether entitled to remuneration—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 15.

Solicitor—Remuneration—Will—Attestation by solicitor—Subsequent appointment as trustee—Whether entitled to remuneration.

A testator by clause 16 of his will provided that "if and so "long as my trustees are retaining any part of the trust fund "[his residuary estate] and receiving and applying the income" they were entitled to pay themselves 5 per cent. of the income thereof "to be equally divided between them by way of remuneration for their services . . ." By clause 17 he provided that "any person who may for the time being be an executor or a "trustee of my will and who may be a solicitor shall be entitled "to charge and shall be paid out of my estate for his services "in the same manner as though not being an executor or trustee "he had been employed by my executors or trustees to render "such services . . ."

One of the trustees died after the death of the testator and after the will had been proved; the surviving trustee appointed a solicitor who had attested the will to be a trustee in the place of the trustee who had died:—

Held, that an attesting witness was precluded by section 15 of the Wills Act, 1837,[1] from taking any benefit under the will, although he was not in the class entitled to any benefits under the will either when he attested it or when it was proved and only later entered that class; accordingly the solicitor was not entitled to remuneration for his services as trustee under clause 16 or to charge professional remuneration under clause 17.

In re Pooley (1888) 40 Ch.D. 1; 5 T.L.R. 21 and *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311 considered.

ADJOURNED SUMMONS.

By his will dated April 20, 1933, Sir Frederick Henry Royce, Bt., appointed the plaintiff, Mrs. Ethel Tildesley, and one Albert William Claremont as executors and trustees thereof.

By clause 16 he provided: "I declare that if and so long as "my trustees are retaining any part of the trust fund [his "residuary estate] and receiving and applying the income, it shall "be lawful for them to pay to themselves out of such income "before dividing the same such a sum as shall equal five per "cent. thereof to be equally divided between them by way of "remuneration for their services . . ." By clause 17 he provided: "I declare that Albert William Claremont or any person "who may for the time being be an executor or a trustee of my "will and who may be a solicitor shall be entitled to charge and

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[1] Wills Act, 1837, s. 15: ". . . if "any person shall attest the execution of any will to whom or to "whose wife or husband any beneficial . . . gift . . . shall be thereby "given or made, such . . . gift . . . "shall, so far only as concerns such "person attesting the execution of "such will, or the wife or husband "of such person . . . be utterly null "and void, and such person so attesting shall be admitted as a witness to prove the execution of such "will . . . notwithstanding such . . . "gift . . ."

"shall be paid out of my estate for his services in the same "manner as though not being an executor or trustee he had been "employed by my executors or trustees to render such services ". . ."

The will was attested by the first defendant, George Henry Richards Tildesley, a solicitor, and another.

The testator died on April 22, 1933, and his will was proved in the Principal Probate Registry on June 6, 1933, by the plaintiff and Albert William Claremont. The latter died on August 5, 1934; and by a deed of appointment dated July 16, 1934, the plaintiff appointed the defendant to be the other trustee of the testator's will.

By this summons the court was asked by Question 1 thereof to determine whether, having regard to the fact that the defendant George Henry Richards Tildesley was an attesting witness to the testator's will, he had been and was entitled as a trustee of the will: (a) to receive remuneration for his services under clause 16 of the will or (b) to charge professional remuneration as a solicitor against the testator's estate under clause 17 thereof.

H. E. Francis for the plaintiff.

Raymond Walton for the first defendant, Tildesley. The first defendant is entitled to remuneration under clauses 16 and 17 of the will notwithstanding section 15 of the Wills Act, 1837. There is no distinction for this purpose between the remuneration arising under the two clauses. The disqualification in section 15 of the Act is aimed at ensuring that the attesting witnesses are not biased because they take an interest under the will. It is necessary to look at the old law to understand the purpose of the section. Under the Statute of Frauds a devise of freeholds was invalid unless it was attested by three "credible" witnesses, and witnesses having an interest under the will did not rank as credible witnesses. The Wills Act, 1752, effected a change in the policy of the law, and where a will in respect of land was attested by a person having a beneficial interest therein, that beneficial interest was cut out but the witness was admitted to prove the will. Section 15 of the Wills Act, 1837, repeats the prohibition against gifts to attesting witnesses and extends it to all property and to the husband or wife of an attesting witness. In *Windham* v. *Chetwynd*,[2] where it was held that a will attested by three interested witnesses was good, Lord Mansfield stated there that the material date was when the will came to be proved.

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[2] (1757) 1 Burr. 414.

In *In re Pooley*,[3] which was a decision of the Court of Appeal under the Act of 1837, a solicitor who attested the will was debarred from taking any remuneration under the charging clause in the will, but in that case the solicitor had an interest at the date of attestation, which is the material time to ascertain whether an attesting witness has an interest of which he must be deprived in order to give effect to section 15; an interest which is acquired after the death of the testator and after probate is not within the mischief of the section. In *Thorpe* v. *Bestwick*[4] the marriage of an attesting witness to a devisee did not affect the devise, on the principle that at the time he attested the will he had no interest and was not married to anyone who took a beneficial interest under the will. That case has always been good law; it is relied on as establishing that the first defendant is not deprived of the interests under clauses 16 and 17, since he had no interest when he attested the will, and only acquired them when subsequently he was appointed trustee. Moreover, a contrary argument[5] by counsel in that case was not accepted.

Alternatively, the first defendant is entitled to take remuneration under clauses 16 and 17, because he takes it not under the will but under the appointment as trustee. [*In re Young*[6] and *In re Ray's Will Trusts*[7] were also referred to.]

E. I. Goulding for the second defendant, one of the persons contingently interested in a share of residue. The first defendant by attesting the will is precluded from taking any benefit under clauses 16 and 17. It is conceded that no reliance for that submission can be placed on the old law. Lord Mansfield's judgment in *Windham* v. *Chetwynd*[8] was relied on, but that case was the beginning of a controversy as to whether the material date to test the matter was the date of attestation or the date when the will came to be established before the court. Lord Camden radically differed from Lord Mansfield: see *Hindson* v. *Kersey*.[9] But all these cases are irrelevant on the present statute law.

To get rid of injustice the Wills Act, 1752, in respect of land, and the Wills Act, 1837, in respect of all property, introduced a new principle with regard to witnesses; if a witness takes any benefit under the will, that interest fails but he remains a competent witness to prove the will. Once that point is arrived at, the old law is of no avail. One cannot draw a line between a gift which must take effect and a gift which only takes effect on a certain contingency; the only way to give effect to the policy laid down by the Act of 1837 is that if events have occurred (as here) by which a benefit is given later to an attesting witness, that benefit must be struck out.

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[3] (1888) 40 Ch.D. 1; 5 T.L.R. 21.

[4] (1881) 6 Q.B.D. 311.

[5] Ibid. 312.

[6] [1951] Ch. 344; [1951] 1 T.L.R. 262; [1950] 2 All E.R. 1245.

[7] [1936] Ch. 520; 52 T.L.R. 446; [1936] 2 All E.R. 93.

[8] 1 Burr. 414.

[9] (1760) Burn's Ecc. Law, 9th ed., vol. 4, p. 116.

The true approach to the question is to be found in the judgment of Cotton L.J. in *In re Pooley*,[10] where he held that the right given to any trustee who might be a solicitor to charge for his work was a benefit under the will within the meaning of section 15. The only difference in that case was that the solicitor was appointed a trustee by the will itself and here the first defendant was subsequently appointed a trustee; but the words in that case were "any trustee who may be a solicitor shall be entitled "to charge . . . ," which are similar to the words in the present case, and it was not suggested by the judge that there might be any difference between a trustee appointed by the will and one subsequently appointed. *In re Ray's Will Trusts*[11] is distinguishable because the attesting witness only received the bequest as trustee and not beneficially.

Thorpe v. *Bestwick*[12] lays down no general principle but merely shows the point of time when the position of the husband or wife of an attesting witness is to be ascertained. *In re Young*[13] is a very different case; it related to secret trusts, and Danckwerts J. said that it had nothing to do with the Wills Act, 1837. The first defendant is in a dilemma; if he is asked how he should be allowed remuneration, his answer must be because the will provided it for any person who is a solicitor, and on that answer he comes within *In re Pooley*.[14] See also *Commissioner of Stamp Duties of New South Wales* v. *Pearse*,[15] which is the most recent case on this subject, where it was held that the provision for remuneration by a will was a benefit under the will. If the submission for the first defendant were accepted, it would be difficult to place a construction on the statute and to draw a line as to what interest is sufficient.

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[10] 40 Ch.D. 1.

[11] [1936] Ch. 520.

[12] 6 Q.B.D. 311.

[13] [1951] Ch. 344.

[14] 40 Ch.D. 1.

[15] [1954] A.C. 91; [1954] 2 W.L.R. 5; [1954] 1 All E.R. 19.

[Wynn-Parry J. What really happens is that he becomes a member of a class to whom a gift was given by the will.]

The gift as regards him is null and void. The Act can only be kept workable by keeping to the language of the section, even though it may entail hard cases.

Denys Buckley for the Attorney-General. Whether the Attorney-General has any interest depends on the answer to other questions, but if he has any interest it would be the same as that of the second defendant, and the argument on his behalf is adopted.

Wynn-Parry J. The first question with which I have to deal is not an easy one and it is one as regards which, curiously enough, there is no direct authority. The question arises because the first defendant was an attesting witness to the testator's will. On the death of one of the two trustees named in that will he was appointed by the surviving trustee to be a trustee of the will. [His Lordship referred to clauses 16 and 17 and continued:]

Having regard to the circumstance that the first defendant attested the will, is he, on becoming a trustee, entitled to receive remuneration under clause 16 and to make professional charges under clause 17 or is the circumstance that he attested the will fatal to his right to receive any benefit under either of those clauses? The question really turns on section 15 of the Wills Act, 1837. [His Lordship read the section and continued:] That section was substituted for the corresponding section, section 1, of the Wills Act, 1752. In that section, however, there was no reference to the husband or wife of an attesting witness, and to that extent the earlier section is extended. The Act of 1752 effected a vital change in the policy of the law because previously the lack of what the Statute of Frauds calls three credible witnesses vitiated the whole will; whereas under what might be called "the "new law" dating from 1752 the will is to stand, but the gift is to fail.

The real question which emerges can be put this way: it has been held, and the proposition is beyond dispute, that the provision that a solicitor is to be entitled to the charge, is a legacy. If a person is named in the will as executor and as a solicitor, and the will contains a charging clause, then, of course, at all material times he is a member of a class of persons who have the right to make professional charges. If, however, he only enters that class after the death of the testator, but has attested the will, is he, though entering the class after the death of the testator, within the mischief of section 15? That appears to me to be a difficult question to answer.

In *In re Pooley*,[1] which was a decision of the Court of Appeal, a testatrix appointed two named persons, the second of whom was a solicitor, as executors and trustees of her will and declared that any trustee who should be a solicitor should be entitled to make professional charges. The named solicitor was one of the attesting witnesses and it was held by the Court of Appeal, affirming the decision of Stirling J., that the solicitor was not entitled to any profit costs for business done by him in relation to the estate. The basis of the decision was that the right to make professional charges could only be claimed under the will and was a beneficial interest under it, which the solicitor, as an attesting witness, was precluded from claiming by section 15 of the Wills Act, 1837. That is not exactly this case because there the solicitor in question was named as an executor and trustee in the will, whereas the first defendant here only became a trustee by appointment after the death of the testator. But it is to be observed, as I have stated, that the basis of the decision is that the claim to make professional charges could only have been made under the will.

Mr. Walton relies strongly on *Thorpe* v. *Bestwick*,[2] which lays down the proposition that under section 15 of the Wills Act, 1837, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. Mathew J., in a short judgment, said [3]: "I think the plaintiffs are "entitled to judgment. The policy of the Wills Act, 1 Vict. "c. 26, in depriving the attesting witness of any legacy given "by the document of bequest, is not to allow wills to be proved "by the evidence of persons benefited by them, and it makes "void any devise to an attesting witness, or to his or her wife "or husband. In the present case the plaintiff, at the time "when the will was attested, took no benefit under it, but he "subsequently married the devisee, and I am asked to hold that "the result of this marriage is to destroy the validity of the "devise. But there is no such provision in any part of the Act; "the only section which could be referred to is section 24, by "which every will is to take effect as if it had been executed "immediately before the death of the testator."

Mr. Goulding submitted that from this case no general principle but only the very limited one could be deduced, namely,

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[1] (1888) 40 Ch.D. 1; 5 T.L.R. 21.

[2] (1881) 6 Q.B.D. 311.

[3] Ibid. 312.

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that it was only concerned with the point of time when the position of husband or wife was to be ascertained.

Mr. Walton against that drew my attention to the argument of Mr. Firth for the defendant in that case, who is reported as having said [4]: "Section 14 of the Act—enacting that if any "person who shall attest the execution of a will shall, at the "time of the execution or at any time afterwards, be incompetent "to prove the execution, such will shall not on that account be "invalid—contemplates that the witness may become incompetent after the execution of the will and before the death of "the testator. To uphold the present devise would enable an "attesting witness who took a devise under the will to secure "himself by antedating it."

For my own part I take the words of the judgment and extract from them what Mr. Goulding submits, namely, that it is directed simply to considering when a person is to be considered as being wife or husband for the purposes of section 15 of the Wills Act, 1837.

My attention was drawn to a passage from the judgment of the Privy Council, delivered by Lord Cohen, in *Commissioner of Stamp Duties of New South Wales* v. *Pearse*.[5] Lord Cohen says [6]: "Their Lordships agree with the majority in the High "Court that the decisions to which Williams J. refers, and in "particular the decisions in *In re Thorley* [7] and *In re Brown*,[8] "lead inevitably to the conclusion that such a provision as "clause 13"—that is the charging clause—"confers a gift on "the executor and enables him to take out of the assets of the "testator something which the law would not otherwise allow."

It is perfectly true that the appointment of the first defendant as a trustee has the result of enabling him to take out of the assets of the testator something which the law would not otherwise allow because there is in the will a charging clause. Against that there is to be borne in mind that it is with the proving of a will that, primarily at any rate, section 15 of the Wills Act, 1837, is concerned. There then remains the short, but still difficult, question of the language of the section. Has one who attests the will—although he is not in the class which has any beneficial interest either when the will is attested or when the will comes to be proved—any right, if he afterwards enters a class defined

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[4] 6 Q.B.D. 311, 312.

[5] [1954] A.C. 91; [1954] 2 W.L.R. 5; [1954] 1 All E.R. 19.

[6] [1954] A.C. 113.

[7] [1891] 2 Ch. 613; 7 T.L.R. 479.

[8] [1918] W.N. 118.

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by the will, to take the benefits which the provisions of the will seek to confer on that class? I find this a difficult question and I can well imagine that different minds might well take different views. I come to the conclusion that the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he only enters a class intended to benefit by the will after the will has been proved.

There is a good deal to be said for the argument put forward by Mr. Walton, but I think that it would necessarily in many cases lead to uncertainty and it might, in certain cases, lead to collusion. For those reasons, therefore, I come to the conclusion that, in answer to Question 1, I should declare that the first defendant is not entitled either to receive remuneration for his services under clause 16, or to charge for professional remuneration under clause 17.

Declaration accordingly.

Solicitors: *Jaques & Co.; Callingham, Griffith & Bate; Treasury Solicitor.*

I. G. R. M.

HOLMES AND ANOTHER *v.* KEYES AND OTHERS.

C. A.

1958

Mar. 24, 25.

Jenkins, Romer and Ormerod L.JJ.

Company—Meeting—Vote—Date of vote—Poll taken on resolution for election and completed—Votes counted and result declared on following day—Whether director elected on day of poll or when result declared—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 182.

On December 23, 1957, at a general meeting of the G. Co. a poll was taken on resolutions for the election of the defendants to be directors. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers informed the company that the defendants had been elected. The company's articles required that the qualification of a director should be the holding of 500 shares in the capital of the company and that, in accordance with section 182 of the Companies Act, 1948,[1] he should obtain that qualification within two months after his appointment. The articles further provided that a transferor of shares should be deemed to remain the holder of shares until the name of the transferee was entered in the company's register. The defendants' names were not entered in the company's register as holders of the requisite number of qualification shares until the afternoon of February 24, 1958.

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[1] Companies Act, 1948, s. 182: "(1) Without prejudice to the restrictions imposed by the last foregoing "section, it shall be the duty of "every director who is by the articles "of the company required to hold a "specified share qualification, and "who is not already qualified, to "obtain his qualification within two "months after his appointment, or "such shorter time as may be fixed "by the articles. . . . (3) The office "of director of a company shall be "vacated if the director does not "within two months from the date of "his appointment, or within such

On a motion to restrain the defendants from acting as directors of the company, the plaintiffs contended that the defendants were elected on December 23, 1957; that, therefore, the period within which they must obtain their qualification began to run at midnight on December 23/24, 1957; and that the entry of the defendants' names in the register on February 24, 1958, was too late.

Danckwerts J. granted the injunction sought. On appeal:—

Held, that, in effect, the meeting should be treated as continuing until the result on the poll was ascertained, and there could be no effective appointment of a director until then. The elections of the defendants therefore took place on December 24, when the result of the poll had been ascertained, and, accordingly, the period within which they were required to obtain their qualifications began at midnight on December 24/25, 1957, and expired at midnight, February 24/25, 1958. Therefore, the registration of the defendants' names on February 24 was within time.

Shaw v. *Tati Concessions Ltd.* [1913] 1 Ch. 292; 29 T.L.R. 261 and *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (*1908*) *Ltd.* [1926] W.N. 78 applied.

Decision of Danckwerts J. [1958] Ch. 670; [1958] 2 W.L.R. 540; [1958] 1 All E.R. 721 reversed.

APPEAL from Danckwerts J.

By this motion in the action, the plaintiffs, William Arthur Holmes and Zena Daniels, on behalf of themselves and all other shareholders in the Gordon Hotels Ltd., sought an interlocutory injunction restraining the first two defendants, Lord Keyes and Fredman Ashe Lincoln, from acting as directors of the company, the third defendant.

On December 23, 1957, at a general meeting of the company, resolutions for the election of the defendants to be directors were presented and, in accordance with a previous demand, a poll was taken on the resolutions. The voting was completed on that day but the counting did not take place until the following day, December 24, when the scrutineers communicated the result,

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"shorter time as may be fixed by the "articles, obtain his qualification, or "if after the expiration of the said "period or shorter time he ceases at "any time to hold his qualification. ". . . (5) If after the expiration of the said period or shorter time any "unqualified person acts as a director "of the company, he shall be liable "to a fine not exceeding five pounds "for every day between the expiration of the said period or shorter "time or the day on which he ceased "to be qualified, as the case may be, "and the last day on which it is "proved that he acted as a director."

namely, that the defendants had been elected to the company. The defendants were not told of the result until about December 27. Article 23 of the Company's Articles of Association provided that " . . . the transferor shall be deemed to " remain the holder of the share until the name of the transferee " is entered in the register." Article 83 provided: " The quali-" fication of a director other than a nominated director shall be " the holding in his own right of 500 ordinary shares of the " company of £1 each and section 141 of the Act [the Companies " Act, 1929] shall be duly complied with by every director " requiring such qualification." Section 141 of the Companies Act, 1929, was in terms similar to those of section 182 of the Companies Act, 1948. No steps were taken by the defendants to acquire the necessary qualification until about January 31, 1958, when the requisite number of shares were purchased by brokers on behalf of each of them. The completion of the purchases was delayed, however, until February, 1958, and the defendants' names were not entered in the company's register as holders of the shares until the afternoon of February 24, 1958.

The plaintiffs contended that the defendants were elected to be directors on December 23, 1957; that the period of two months in which they were required to obtain their qualifications began to run at midnight on December 23/24, 1957, and expired at midnight on February 23/24, 1958, and that the entry of the defendants' names in the company's register on the afternoon of February 24, 1958, was too late. The defendants contended that they were not appointed until December 24, 1957, and the period, therefore, did not begin to run until midnight on December 24/25, 1957.

Danckwerts J. granted the injunction sought.

The first two defendants appealed.

Gerald Gardiner Q.C. and *T. D. D. Divine* for the second defendant. The question is what constitutes the election or appointment of a director, and at what time is he appointed? It is no longer contended that the individual defendants became duly qualified when they entered into contracts to purchase shares; it is conceded that they could only become qualified when their title to them was completed by registration. Further, it is not disputed that if the defendants' election took place on December 23, 1957, time began to run for the purpose of acquiring the necessary qualification shares prescribed by section 182 of the Act of 1948 from midnight on that day, whilst if the election is treated as taking place on December 24, 1957, time began to run from midnight on that day.

Suppose the case of a company which has articles of association in terms similar to those of the defendant company, and a general meeting is held on a Monday at which resolutions for the election of directors are presented, and a poll is demanded. If the poll is taken on Tuesday, the votes counted on Wednesday, and the result declared on Thursday, on which day was a candidate for the office of director validly appointed?

In favour of Monday, it could be contended that the internal arrangements of a company depend upon its articles, and here the point is covered by article 66: "If a poll be demanded . . . it "shall be taken at such time and place and in such manner as the "chairman shall direct, and the result of the poll shall be deemed "to be the resolution of the meeting at which the poll was "demanded. . . ." Accordingly, since the meeting at which the poll was demanded was held on Monday, the election must be deemed to have taken place on Monday, and since the matter is covered by the article it is unnecessary to look at any other provision.

Those who contend that Tuesday is the relevant day might argue that it is not Monday for two reasons: (a) article 66 is not concerned with time or date at all, its sole effect is to make the result of the poll the equivalent of the meeting at which it was demanded. Further, article 66 must be read in conjunction with article 104, which provides: "Subject to any resolution for "reducing the number of directors, if at any meeting at which "an election of directors ought to take place, the places of the "retiring directors are not filled up, the retiring directors as afore-"said shall be deemed to have been re-elected." (b) Where at a meeting a poll is demanded, to be taken at a future date, then the meeting continues for the purpose of the poll: *Shaw* v. *Tati Concessions Ltd.*[2] [Reference was also made to *Neuschild* v. *British Equitorial Oil Co. Ltd.*[3]; *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*[4]; *Jackson* v. *Hamlyn.*[5]]

It is submitted that either Wednesday or Thursday (it matters not which for present purposes) is the relevant day. The argument against Monday and Tuesday as the relevant date is adopted, but it is contended that it is Wednesday, since an election is a process only part of which consists of the casting of votes; it is not completed until the votes have been counted and the result ascertained. The primary meaning of the word "poll" in this connexion is counting: see meanings (6) and (7) under the heading "poll" in the Oxford English Dictionary. A poll is not complete until all the votes have been cast and counted, and if there is a tie, the chairman has a casting vote: see article 68. The result is the vital factor; the taking of the poll is not complete until the result is ascertained; it is not until that moment that a candidate can be said to have been elected a director. [Reference was made to *Catesby* v. *Burnett*.[6]]

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[2] [1913] 1 Ch. 292, 297.

[3] [1925] Ch. 346.

[4] [1926] W.N. 78.

[5] [1953] Ch. 577.

The correct day may also be Thursday, since (a) in law, so far as the company is concerned, that which alone is decisive is the *declared* result of the poll. (b) There is nothing in the Companies Act, 1948, or in the articles, to prevent the chairman of the meeting at which a poll is demanded announcing that the result of the poll would not be declared until two months hence. In these circumstances, however, a successful candidate would not be able to obtain his qualification shares within the prescribed period, and, indeed, would have to vacate his office of director on the day on which it was declared that he had been elected a director. (c) The declaration of the result is the completion of the poll: see *per* Russell J. in *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (*1908*) *Ltd.*[7]

In the present case the result of the poll was ascertained and declared on the same day, December 24, 1958, and, accordingly, adopting the arguments in favour of Wednesday and/or Thursday as stated above, the individual defendants were "appointed" directors within the meaning of section 182 (1) of the Companies Act, 1948, on December 24, 1958, and therefore acquired their qualification shares within the period prescribed by that section.

Finally, on each of the resolutions at the meeting of December 23, 1957, a poll was demanded without first going through the formality of a show of hands. It is submitted that on the true construction of article 65 that might have the effect of vitiating the appointments of all five directors who were appointed at that meeting, since, as there had been no valid show of hands, the demand for a poll was irregular: see *per* Lord Blanesburgh in *Carruth* v. *Imperial Chemical Industries Ltd.*[8]

J. E. S. Ricardo, for the first defendant, adopted the argument on behalf of the second defendant. Section 182 of the Companies

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[6] [1916] 2 Ch. 325.

[7] [1926] W.N. 78, 79.

[8] [1937] A.C. 707, 754, 755.

Act imposes a duty on a director to obtain his share qualification within two months. There is no provision either in the Companies Act, 1948, or in the articles prescribing a time limit within which the result of a poll must be declared. In those circumstances, it would be surprising if a person who had stood for the office of director was under a duty to acquire within the two months the shares necessary to qualify him in case it should turn out that he had been elected. [Reference was also made to sections 144, 183, 187, 190 of the Companies Act, 1948.]

Denys Buckley for the defendant company. The only authority relating to a vote being taken by a show of hands would appear to be the dictum of Lord Blanesburgh in *Carruth* v. *Imperial Chemical Industries Ltd.*,[9] but the relevant article in that case was differently worded from article 65 of the defendant company's articles. Under the terms of article 65 the necessity for a show of hands would seem to be otiose if in any event there is to be a poll, that is, it is known that a poll is to be demanded.

Gilbert Beyfus Q.C. and *Paul Sieghart* for the plaintiffs. *Carruth* v. *Imperial Chemical Industries Ltd.*[9] is plainly distinguishable. The article was quite different from article 65 here. It concerned the right to demand a poll immediately upon the declaration of the result of a show of hands. In the circumstances Lord Blanesburgh held that there had not been a valid show of hands and that, accordingly, the demand for a poll was irregular. In any event, Lord Blanesburgh's observations were merely obiter. The words " unless before " in article 65 make it plain that if a poll is demanded before there is a show of hands it is not necessary to go through the formality of having a show of hands.

On the main question, the election was complete when the poll was closed, and the subsequent ascertainment of the result was mere machinery. Accordingly, the election of the defendants took place on December 23, 1957, and the period within which they had to obtain their qualification expired at latest at midnight on February 23/24, 1958; their registration as holders of the shares on the afternoon of February 24, 1958, was therefore too late. That the defendants' election took place on December 23, 1957, is reinforced by a consideration of the provisions of section 26 of the Betting and Lotteries Act, 1934. If on the morning of December 24, 1957, X had wished to make a bet on whom had been appointed directors of the defendant company, he would not have been making a forecast as to a " future event " but "of a past event the result of which is not yet ascertained or "not yet generally known." The close of the poll is the vital date, if the poll is postponed then a successful candidate is elected a director on the day the poll closes: *Shaw* v. *Tati Concessions Ltd.*[10] and *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*[11] The argument for the defendants, if accepted, might lead to an impossible situation. Suppose five shareholders of this company held the majority of the shares and cast their votes at 4 p.m. on December 23, 1957, and at 6 p.m. on that day all of them were killed in an accident. It would follow from the defendants' argument that they had been elected by dead men! [Reference was also made to *Catesby* v. *Burnett.*[12]]

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[9] [1937] A.C. 707, 754, 755.

Gardiner Q.C. in reply. The contention that the election was complete on the day the poll closed involves using the word "poll" in its secondary sense of the casting of votes. The defendants rely on its primary meaning of *counting* of votes.

Ricardo, in reply, cited *Young* v. *Higgon.*[13]

JENKINS L.J. stated the facts and continued: The substantial question in the case is whether in the circumstances, for the purposes of section 182 of the Act of 1948, the two individual defendants should be treated as having been appointed at the meeting itself so soon as all the votes on the relevant resolutions had been cast, or whether the true view is that the two individual defendants were not appointed until the result of the poll was ascertained on the following day. The importance of that question is this: If the individual defendants are to be treated as elected on December 23, then for the purposes of the two months allowed for the acquisition of qualification shares, time began to run from midnight on December 23, 1957, and expired, as I understand it, at midnight on February 23.

The individual defendants in fact set about acquiring their qualification shares some time during January, and well within the two months they became beneficially entitled to shares, but there was no registration of the individual defendants as proprietors of the shares acquired until some time on February 24, which would be too late, if time is properly to be calculated from midnight on December 23. If, on the other hand, they were not elected until December 24, when the result of the poll was ascertained, then their acquisition of qualification shares and completion of their title by registration took place just within time. The question is a highly technical one and probably would not have been litigated at all but for certain unfortunate internal divisions in the councils of the company.

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[10] [1913] 1 Ch. 292.

[11] [1926] W.N. 78, 79.

[12] [1916] 2 Ch. 325.

[13] (1840) 6 M. & W. 49.

[His Lordship read section 182 of the Act of 1948 and continued:] Article 1 of the articles of association of the company excludes Table A in the First Schedule to the Companies Act, 1929, which was the Act in force when the articles were adopted, "except so far as the same are repeated or contained in these "articles." Article 80 deals with the number of directors and provides: "Until otherwise determined by a general meeting, the "number of directors shall not be less than three nor more than "nine." I understand that the maximum of nine was reduced to seven, exclusive of certain directors appointed on behalf of debenture holders, but nothing turns upon that.

Article 81 is the usual provision for the appointment of directors by the board: "The directors may from time to time "appoint any other person to be a director, either to fill a casual "vacancy or by way of addition to the board, but so that the "maximum number fixed as above shall not be thereby exceeded. "Any director appointed under this article shall hold office only "until the ordinary general meeting following next after his "appointment, but shall then be eligible for re-election."

Article 83 concerns the qualification of a director. That article as it originally stood was altered by special resolution, and in its new form reads as follows: "The qualification of a director "other than a nominated director shall be the holding in his own "right of 500 ordinary shares of the company of £1 each and "section 141 of the Act shall be duly complied with by every "director requiring such qualification." Section 141 of the Act of 1929 corresponds to section 182 of the Act of 1948.

Article 98 deals with the vacation of office by directors and it provides: "The office of a director shall be vacated." Then there are events (A) and (B) which are not material. Then (C): "If "he ceases to hold the number of shares required to qualify him "for office or does not acquire the same within two months after "election or appointment." There are three other disqualifying events, with which we are not concerned.

There follow provisions as to the rotation of directors. They begin with article 100: "At the ordinary meeting in every year, "two of the directors for the time being shall retire from office." Then there is the usual provision deciding who is to retire, the rule being that the longest in office since their last election are the ones to retire; and there is a provision that as between directors of equal seniority, the directors to retire, in the absence of agreement, are to be selected from among them by lot. Then: "A retiring director shall be eligible for re-election and shall act "as a director throughout the meeting at which he retires."

Article 102 provides: "Subject to any resolution for reducing "the number of directors, the company shall, at the meeting at "which any directors retire in manner aforesaid, fill up the "vacated office of each director by electing a person thereto." Nothing turns on article 103.

Article 104 provides: "Subject to any resolution for reducing "the number of directors, if at any meeting at which an election "of directors ought to take place, the places of the retiring "directors are not filled up, the retiring directors as aforesaid "shall be deemed to have been re-elected."

We were referred in the course of the argument to articles 23 and 24, which deal with transfers of shares. I need not refer to those articles, for they were quoted only on the point that a director cannot be said to have qualified himself by the requisite shareholding unless and until his title is perfected by registration. That point was the subject of some argument, I understand, before the judge, but it is not now contended that a director can claim to have acquired his qualifying shares until he is actually on the register.

Finally, I should refer to some of the articles dealing with general meetings and proceedings at general meetings. Article 60 is the usual article stating the ordinary business at an ordinary meeting, and that includes the election of directors. Then article 63 gives the usual power to the chairman, with the consent of any meeting at which a quorum is present, to adjourn the meeting from time to time and from place to place.

Article 65 is another article which has been amended by special resolution. In its present form it reads thus: "At any "general meeting of the company a resolution put to the vote of "the meeting shall be decided on a show of hands unless before "or upon the declaration of the result of the show of hands a "poll be demanded in writing by the chairman or by at least five "members present in person or by proxy and entitled to vote "at the meeting, or by the holder or holders in person or by "proxy of at least one-tenth of the total voting rights of all "members having the right to vote at the meeting." I do not think it is necessary for me to read the whole of that article, which is in a very usual form. After the provisions for demanding a poll, it goes on: "and unless a poll be so demanded a declaration by the chairman of the meeting that a resolution has been carried, or has been carried by a particular majority, or lost, or not carried by a particular majority, shall be conclusive and an entry to that effect in the minute book of the company shall be conclusive evidence thereof, without proof of the number or proportion of the votes recorded in favour of or against such resolution."

Article 66 is of some importance. It is in these terms: "If a poll be demanded in manner aforesaid, it shall be taken at such time and place and in such manner as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Article 68 provides: "In the case of an equality of votes, either on a show of hands or at a poll, the chairman of the meeting shall be entitled to a further or casting vote, in addition to the votes to which he may be entitled as a member." Article 69: "The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded."

Those are all the relevant articles, but I should perhaps refer again to the Act for section 144. That provides: "Where a resolution is passed at an adjourned meeting of—(*a*) a company"—that is the material case—"the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date."

In the course of his submissions to us on behalf of the two individual defendants, Mr. Gardiner made two admissions. First, he said that he did not pursue the contention to the effect that the two individual defendants became duly qualified when they entered into contracts to purchase shares, but accepted the view that they could only become qualified when their title was completed by registration. That point, therefore, disappears from the case. Mr. Gardiner further agreed that if the election took place on December 23, time began to run from midnight on that day, and, on the other hand, if the election is treated as taking place on December 24, time began to run from midnight on that day. So there is no dispute as to the method of computing time, and it is clear that if December 23 was the proper date from which to compute the time, these two defendants were too late. On the other hand, if the proper date was December 24, they were within time.

The judge, after stating the facts and citing the relevant articles of association, expressed his conclusion thus[1]: "In the "present case the meeting was called on December 23 and was "on no other day. It is true that the result was not ascertained "till the next day, but the meeting was complete and the poll "was complete, except for the declaration of the result, on "December 23; and the elections of the defendants, if they were "valid, took place on that day and on no other day. Conse"quently, time did start to run from midnight at the end of "that day, December 23, and, therefore, expired at midnight on "February 23, 1958; and the registration of the defendants' "shares in their names on February 24 was too late."

That is the conclusion which Mr. Gardiner, for the two individual defendants, was concerned to attack. In the course of his argument he referred us to certain authorities, which were also referred to before the judge but which he regarded as distinguishable from the present case. It is perfectly true that these authorities did each of them deal with a different set of circumstances, but two of them, I think, do afford some assistance to the appellants' case, and I propose to confine my citation to those two cases. The first is *Shaw* v. *Tati Concessions Ltd.*,[2] which is a decision of Swinfen Eady J. The headnote reads: "A poll demanded at a company meeting was directed to be "taken at a future date, but the meeting itself was not "adjourned:—*Held*, that the mere postponement of the poll was "not an adjournment ad hoc of the meeting within the meaning "of an article allowing the lodgment of proxies forty-eight hours "before a meeting 'or adjourned meeting,' but the original meet"ing continued for the purpose of the poll, and no fresh proxies "could be lodged."

The judge said this at the conclusion of his judgment[3]: "If "there is an adjourned meeting they"—that is, the proxies—"may be deposited later, namely, forty-eight hours before the "adjourned meeting. But here there was no adjourned meeting, "and the taking of a poll is not a meeting. The true legal "position is this. There is no adjourned meeting, but the original "meeting continues for the purpose of taking the poll until the "poll is closed. Therefore proxies obtained and lodged later than "forty-eight hours before the original meeting are not available."

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[1] [1958] Ch. 670, 677.

[2] [1913] 1 Ch. 292; 29 T.L.R. 261.

[3] [1913] 1 Ch. 292, 297.

Mr. Beyfus, in regard to that authority, points to the words "until the poll is closed," and he says the poll was closed in the present case when the votes on the poll were cast. Therefore, he says that this authority should not be regarded as telling against him. I doubt whether, when he referred to the closing of the poll, Swinfen Eady J. meant to say that the meeting did not continue for the purpose of ascertaining the result of the poll.

The other authority, *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*,[4] appears to me clearly to regard a meeting in such a case as continuing until the declaration of the poll, which is in effect the ascertainment of the result of the poll. It was a case tried by Russell J. To put it very shortly, the question appears to have been whether, on the true construction of the articles of association of the company, a proxy could be revoked between the holding of a meeting at which a poll was demanded on a resolution and the time when the poll was held, this being a case where the entire poll—that is to say, the casting of the votes as well as the ascertainment of the result—was held on a day subsequent to the meeting. I think that sufficiently indicates the nature of the case, and I refer to it for these observations[5]: "The first point was there had been in fact no intimation of any "revocation at all. In his Lordship's opinion that could not be "sustained. The second point was in his view a more formid-"able one. It was said that no intimation of the revocation was "received before the meeting. In his Lordship's opinion, if "English language meant anything, the article required that in "order to invalidate the vote, intimation in writing of the revoca-"tion must be received at the office before the meeting, and in "his view that must mean before the commencement of the "meeting. It was well settled that the taking of a poll was not "a meeting of the company in the strict sense, but was in "law a mere continuation of the meeting at which the poll was "directed to be taken. For the particular purpose in question "therefore the meeting must be held to have begun on Decem-"ber 15 and to have come to an end at the declaration of the "poll, a week later. The intimation of revocation, however, had "been received between those two dates. In his opinion it was "impossible to say on the true construction of the particular "article that the proviso had been complied with, namely, that "intimation in writing of the revocation had been received before "the meeting."

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[4] [1926] W.N. 78.

[5] Ibid. 79.

Those are the only two authorities to which I propose to refer on the effect of a poll being taken, or the result of a poll being declared, on a day subsequent to the date of the actual meeting at which the resolution was put, but I should also make some reference to *Carruth* v. *Imperial Chemical Industries Ltd.*[6] I cite that for this reason: It appears that in fact on each of the resolutions appointing directors at the meeting of December 23, a poll was demanded without first going through the formality of a show of hands, and it was suggested that, on the true construction of article 65, that vitiated not only the appointments of the two individual defendants, but also the appointments of the directors who were appointed at the same meeting (in some ways one might say a rather appropriate conclusion to the dispute), but I am satisfied that the resolutions cannot be regarded as having been invalidated on that ground.

The case to which I refer dealt with a highly complicated scheme of arrangement between a company and its various classes of shareholders. The presentation of the scheme to the court for approval had to be preceded by the approval of the scheme at a meeting of the company, and also at the meetings of the various classes of shareholders. The proceedings at these meetings had to be regulated in accordance with the articles of association of the company. The particular article of association which was material for the present purpose was the article corresponding to article 65 in the articles of Gordon Hotels Ltd., but it had this important difference, that provision was made for a demand for a poll simply on the declaration of the result of the show of hands.

The point arose in this way: Apparently the arrangements for separating the different classes for the purposes of their several meetings were not as effective as they might have been, so that in the case of at least one meeting there were present holders of shares of the class and strangers of various kinds—I imagine members of the company holding shares of other classes. The resolution was, in fact, put to the vote by show of hands, and on the declaration of the result, a poll was demanded, but Lord Blanesburgh took the point that inasmuch as the meeting was diluted by the presence of strangers, the vote on a show of hands was (as one might say) a nullity because it was impossible to tell how far it included non-members. Of course, that difficulty would not enter into the voting by poll because each member would have to produce proper evidence of his being a holder of shares in the class. So, said Lord Blanesburgh, as there had been no valid show of hands, the demand for a poll was irregular, because the proper time to demand it was upon the declaration of the result of the show of hands, being a valid show of hands.

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[6] [1937] A.C. 707; 53 T.L.R. 524; [1937] 2 All E.R. 422.

In my view, that case does not touch the present case. I should say that the point was taken and dealt with only by Lord Blanesburgh, so that his observations may, I think, be regarded as obiter, though entitled to respect.

What, to my mind, concludes the matter is the circumstance that the article with which we are here concerned, article 65, as adopted by special resolution, provides as follows: "At any "general meeting of the company a resolution put to the vote "of the meeting shall be decided on a show of hands unless before "or upon the declaration of the result of the show of hands a poll "be demanded . . ." It is to be observed that a poll can be demanded before the show of hands as well as upon the declaration of the result of the show of hands. The language is capable of reading: "Unless before the declaration of the result of the "show of hands or upon the declaration of the result of the show "of hands," and then it could conceivably be argued that the demand could not be made before the declaration of the result of the show of hands if there was no show of hands at all. That would be an inconvenient construction, which would compel going through the formality of a show of hands, not for the purpose of obtaining the result of that vote, but merely so that a demand for a poll could be made before the declaration of the result. I think the article should read, as suggested by my brother Romer in the course of the argument, in this way: "At any general meeting of "the company a resolution put to the vote of the meeting shall be "decided on a show of hands unless before (comma) or upon the "declaration of the result of (comma) the show of hands a poll be "demanded." That makes it clear that a poll can be demanded without going through the formality of a show of hands. That question, therefore, is, in my judgment, out of the way.

I should next state as best I can the arguments on either side in this highly technical controversy. The case for the two individual defendants may possibly be put in some such way as this: It cannot be said of any candidate for the office of director that he has been elected or appointed until he can say with truth "I am a director," or until the company could truthfully tell him, if he asked, "You are a director." These defendants agree that knowledge on the part of a candidate of his election is not the test, but they do submit that at all events he is not elected, in any effective sense of that expression, until the company can tell him, if he asks, " Yes, you are a director." It is clear, say these defendants, that neither of them could, during the period between the casting of the votes on the poll and the ascertainment of the result of the poll, claim to be, or to exercise, any of the powers of a director. In these defendants' submission, the taking of the poll was not complete until the result was ascertained. Therefore, the individual defendants could not be said to have been elected until the result was ascertained. The possibility was suggested, I think, of the resolution for the election of a director being put to the vote by show of hands, and in such a case it was said that, although the votes had been cast in the form of hands raised, so that in one sense the election may be said to have taken place, in another sense, and in the effective sense, it cannot be said to have taken place until the result of the show of hands, by counting hands raised on either side, has been ascertained.

On the appellants' side it is further argued that there is no sufficient reason for treating the election (which only becomes effective when the result is ascertained) as relating back to the date of the meeting; and it is pointed out that the period between the meeting and the ascertainment of the result need not (as in the present case) be a matter only of one day, it might be a substantial period; and, indeed, under certain circumstances, delay in ascertaining the result of the poll on the resolution for the appointment of a director might absorb the whole period allowed him under the articles in which to qualify himself. Suppose the articles said that he was to acquire his qualification within a fortnight of his appointment, and suppose a poll on the resolution for his election had been demanded and the result was not ascertained for a fortnight after the date of the meeting. The peculiar result would apparently ensue that at the very moment when for the first time it could be said of him: " He is a director," he would vacate office for failure to acquire his qualification shares. This side of the argument may also be put thus: By the express terms of section 182 of the Act, every director is placed under a duty to obtain his qualification within two months after his appointment. How can a person who has stood for the office of director at a meeting and whose appointment has been the subject of a resolution, voted upon by a poll vote, of which the result has not yet been ascertained, be said to be under a duty to acquire his qualification shares? He does not know whether he is a director or not; the company does not know whether he is a director or not. Nobody knows or can know until the result is ascertained. If he asks the secretary of the company: "Am I "under a duty to acquire my qualification shares?" at any time before the ascertainment of the result of the vote, the secretary could only answer: "Well, you may be under an obligation to "do so, but it is impossible to say whether you are or not." It is obviously unreasonable to expect such a person to acquire the shares necessary to qualify him in case the poll turns out to have resulted in his election.

In substance, therefore, in the appellants' submission, the effect of the view contended for by the plaintiffs and taken by the judge is that the period prescribed by the Act or the article for the acquisition of the qualification would be curtailed by the period of time elapsing between the date of the meeting and the date of the ascertainment of the result of the poll. The true view, as the appellants would have it, is, as I understand it, in effect that the meeting should be treated as notionally continuing until the result of the poll is ascertained and that the appointment of the director concerned takes effect as from the date of such ascertainment. Some support for that view is, I think, to be found in *Shaw* v. *Tati Concessions Ltd.*[7] and *Spiller* v. *Mayo (Rhodesia) Development Co. (1908) Ltd.*,[8] to which I have already referred. It is not right, in the defendants' submission, to treat the ascertainment of the result as a mere formality, and by way of illustration of their submission to the contrary, they point out that in the event of an equality of votes, the chairman has a second or casting vote. They say that the ascertainment of the result is just as much a part of the taking of the poll as the casting of the votes.

Article 66 is relied on to some extent by both sides. It will be remembered that that article provides: "If a poll be "demanded in manner aforesaid, it shall be taken at such time "and place and in such manner as the chairman shall direct, and "the result of the poll shall be deemed to be the resolution of the "meeting at which the poll was demanded." The appellants point out that what is referred to is the result of the poll and not the taking of the poll, and they say the effect of it is that when the result of the poll is ascertained, then that result is to be deemed to be the resolution of the meeting, but they say, in effect, that the resolution of the meeting should be taken as being of the same date as the ascertainment of the result of the poll.

[7] [1913] 1 Ch. 292.

[8] [1926] W.N. 78.

The plaintiffs' view, on the other hand, is that the effect of article 66 is to make the result of the poll the equivalent of the resolution of the meeting, that resolution being dated back to the date of the meeting, that is to say, December 23, 1957, in the present case.

On the plaintiffs' side, the argument is of this nature: The election is complete when the votes are cast on the poll; the ascertainment of the result of the poll is mere machinery; the people who ultimately turn out to have been elected were elected when those votes were cast, although they did not know it and the company did not know it, and although they could not claim to be considered directors pending such ascertainment. Mr. Beyfus, for the plaintiffs, admitted, as I understood him, that if the poll was taken—that is to say, if the votes on the poll were taken—on a later date, then that later date would be the date of the directors' appointment or election; but he says it is otherwise if the votes are cast on the actual day of the meeting and the counting takes place on a later day. That seems to me to involve an extremely fine distinction, because the effect would be that if in the present case the poll, in the sense of the casting of the votes, had been taken on December 24, then that date would have been the date of appointment of the directors concerned, whereas December 23 is taken for the day in the plaintiffs' submission simply because the convenient course was to let the votes be cast on December 23, before the meeting broke up, and to arrange for the votes to be counted and the result to be ascertained on the following day. Moreover, this line of argument involves abandonment of the contention that the election must take place strictly at a meeting, for the holding of the poll on a date subsequent to the actual meeting is recognized as amounting to election on that day.

I hope I have now done justice to the arguments on either side, and, finally, I should endeavour to express my own conclusions. I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable. In my view, the doctrine of relation back for which the plaintiffs contend would produce a wholly unreasonable result, and I decline to adopt it unless constrained to do so by the terms of the Act and the articles. I can find nothing in the Act or the articles which constrains me to do so. I do not

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think that article 66 is inconsistent with the individual defendants' view; on the contrary, I think it tends to support that view. In my judgment, the ascertainment of the result should be considered as part of the poll, and, consequently, there can be no appointment of a director by a general meeting until the result of the poll is ascertained. It is only then that the appointment can become in any sense effective. I think that, in effect, the meeting should be treated as continuing until the result of the voting on the poll is ascertained. Unless the appointment begins when the result of the poll is ascertained and on no earlier date, it would be impossible for the company to know who its directors were. It seems to me that produces a really quite impossible result. It also seems to me to be contrary to principle to place a man under a duty to acquire qualification shares, on the footing that he has been elected as a director, at a period when it is not known whether the resolution appointing him a director has been carried or not.

It is with reluctance that I differ from the judge, a judge of great experience in matters of this kind, but, for the reasons I have endeavoured to express, I would allow this appeal and discharge this injunction.

I should perhaps add that in the course of the hearing before us reference was made to some further evidence which it was suggested might cast doubt on the qualification in shares of the individual defendants or one of them even now. We did not go into the details of that matter because it appeared to us that we should confine our attention to the matters which were raised before the judge. I only wish to say that I am for allowing the appeal simply on the footing that the only material facts were those before the judge and before us, and I say nothing as to any other ground it may be possible to advance for the contention that these directors are not duly qualified.

Romer L.J. I agree. It appears to me that the appeal raises a very short question of construction of section 182 (3) of the Companies Act, 1948, and of article 98 (C) of the company's articles of association. It is said by the plaintiffs that the effect of those provisions is that the two months which the appellants had to acquire their qualification shares started at midnight on December 23/24, on the ground that the poll which had been demanded at the meeting on December 23 was taken on the same day and was then closed, and that there was nothing remaining to be done thereafter except to ascertain the result of the voting.

That was the view which found favour with the judge. The appellants, however, say that the period of two months did not start to run until midnight on December 24/25, because the count did not take place until December 24, and, therefore, it was not known until that day whether the appellants had been elected or not.

It may well be that from one point of view the appellants may be regarded as having been elected directors on December 23, for it was by virtue of the votes given at the meeting on that day that they were appointed to the board. The question is, however, what is meant by " the date of his appointment " in the context in which those words appear in section 182 (3) of the Act. The provisions of that subsection impose a time limit within which a director has to perform a specified act, videlicet, attain his qualification shares. Failure to perform the act within the stipulated time is attended by serious consequences, namely, the compulsory vacation of his office by the director concerned.

In these circumstances, common sense would seem to suggest that the time should not start to run until it was known, at least by somebody, that a position had arisen which necessitated the acquisition of the qualification shares; and that position could not be said to have arisen until it had been ascertained that a particular candidate had in fact been elected, for until that was known, no question of obtaining qualification shares could arise.

It seems to me that in a case such as the present a director cannot be said to have been appointed for relevant purposes until the result of the poll has been made known. Until that moment of time, it is a matter of speculation as to whether he has been elected to the board or not, and until that moment he is neither entitled to exercise the rights nor is he subject to the obligations of a director of the company.

In my judgment, it is not until those rights and obligations are shown to have arisen and a candidate has become clothed with his office accordingly that he can be said to have been appointed for the purpose of the section and article 98 (C).

It is unnecessary to refer to any of the authorities cited further than my Lord has already done. As I have said, it is a short question of construction, primarily of section 182, and in a parallel sense of article 98, and, in my opinion, the effect of those provisions is as I have stated it to be. I would, therefore, allow the appeal. I would only add that I agree that it is irrelevant that the poll was not preceded by a show of hands. This is really quite clear when one analyses article 65 as my Lord has done.

ORMEROD L.J. I agree, and were it not for the fact that we are differing from the judge, I think I should find it unnecessary to add anything to the reasons which have already been given by my brethren.

The issue as it came before this court resolved itself into a short point, and was whether the poll was complete when the votes were cast, or was not complete until the result was ascertained by somebody, not necessarily communicated to the persons interested, but certainly ascertained by somebody.

It was agreed, I think, by Mr. Sieghart, on behalf of the plaintiffs, that in the case of a vote by a show of hands the result was not complete until the votes had been counted and the result of the count declared by the person in charge of the meeting. That seems a reasonable and common-sense view, particularly having regard, as was pointed out, to the fact that people may take their hands down in the course of the voting, and that many other things may happen before the votes are finally counted. But it was contended on behalf of the plaintiffs that the same considerations would not apply to the taking of a poll, that when the votes were cast the matter was complete, the result could then be determined, and the contingencies such as a voter being able to change his mind and withdraw his hand could not arise, and therefore the poll was complete and nothing further needed to be done.

I find it extremely difficult to accept this argument. Apart from anything else, it appears that even when the votes are cast, there may be much to be done and much to be decided before the result of the poll can be ascertained. It may well be that the proxies have to be examined, some of the votes may be disqualified, and so on; and, of course, there is always the possibility, as was pointed out by Mr. Gardiner, that there may be a tie which would require the casting vote of the chairman.

In these circumstances, it seems to be abundantly clear that the poll cannot be said to be taken until these matters have been examined, the votes finally determined and counted and the result ascertained. In this case the votes were cast on December 23, the day of the meeting, but the result was not ascertained until December 24, the day after the meeting.

Mr. Beyfus, as I understand his argument, does not now contend that in any event, having regard to article 66, the result of the poll, which is to be deemed to be a resolution of the meeting, must be dated back to the date of the meeting. His contention is that all that was necessary to be done had been done at the meeting on December 23, and that, in those circumstances, the matter was complete and the directors were elected.

This view does not seem to be in accordance with article 66, which provides that when a poll is taken it shall be taken at such place and in such manner as the chairman may direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. As I see it, the words " the result of the poll " must imply the necessary ascertainment of that result, and until that result is ascertained I find it difficult to understand how the poll could become what the article required, something which may be deemed to be the resolution of the meeting.

In any event, it does appear that any other construction would be so impracticable as to be unworkable. In this particular case, for instance, there were four vacancies on the board of directors. There were five candidates and four were elected. Until the result of the poll was ascertained, the officials of the company had no idea how many of the persons who had been candidates for election had been elected, who they were, and out of the seven directors to which the company was entitled there were only three who could with any certainty be said to be directors of the company. It seems quite impossible that a company should carry on its business in such circumstances. Though the delay here was only a matter of some 24 hours, there seems to be no reason why in a similar case the delay should not be for a very much longer period.

Taking all those matters into consideration, I am of the opinion that the poll here was not taken until the result was ascertained, and as the result was not ascertained until December 24, it means that the election or the appointment of these two directors did not take place until then, and if that be so, they have, of course, acquired their qualification shares in time.

I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal refused.

Solicitors: *Alastair Thomson; A. Kramer & Co.; Herbert Oppenheimer, Nathan & Vandyk; Basil Greenby & Co.*

J. A. G.

1958
Oct. 31.

Danckwerts J.

In re SHIPWRECKED FISHERMEN AND MARINERS' ROYAL BENEVOLENT SOCIETY.

[1958 S. No. 587.]

Charity—Investments—Statutory charity—Powers of investment regulated by special Act of 1850*—Application for wider powers of investment—Whether permissible—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 57.

The applicant society was incorporated by an Act of Parliament of 1850. The investments of the general funds of the society were regulated by section 11 of that Act which provided that the society's moneys might be invested in (a) the mortgages of lands in fee simple or held on lease for a term of which at least 60 years remained unexpired, (b) stock of the public funds of the United Kingdom, and (c) Exchequer Bills, South Sea Stock and Bank Stock. Over the years there had been a steady fall in the value of the society's investments which were all of a kind authorized by law for the investment of trust funds, and a decline in value of fixed income and other trustee investments. On an application for an order that the society's powers of investment be increased by way of a scheme in terms set forth in draft minutes of order annexed to the summons:—

Held, (1) that to allow a wider power of investment was to confer additional powers of investment and was not, therefore, inconsistent with but was in aid of and supplemental to the powers of investment conferred by section 11 of the Act of 1850.

(2) That the Trustee Act, 1925, and in particular section 57 [1] thereof, had modified the provisions of the Act of 1850 so that the court could, under section 57, authorize the investment by the society in a particular fund and also confer upon trustees a general power of investment; and that it was desirable in the present case to give a general power to invest in the terms of the proposed scheme.

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[1] Trustee Act, 1925, s. 57 (1): "Where in the management or administration of any property vested "in trustees, any sale, lease, mortgage, surrender, release, or other "disposition, or any purchase, investment, acquisition, expenditure, or "other transaction, is in the opinion "of the court expedient, but the same "cannot be effected by reason of the "absence of any power for that purpose vested in the trustees by the "trust instrument, if any, or by law, "the court may by order confer upon "the trustees, either generally or in "any particular instance, the necessary power for the purpose, on such "terms, and subject to such provisions and conditions, if any, as "the court may think fit and may "direct in what manner any money "authorized to be expended, and the "costs of any transaction, are to be "paid or borne as between capital "and income."

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The Shipwrecked Fishermen and Mariners' Royal Benevolent Society applied by originating summons for an order to be made by way of a scheme conferring upon it extended powers of investment and authorizing it to treat as one fund the investments which it held for its general purposes and those which it held as trustee for special purposes connected with its work. The terms of the scheme were set forth in draft minutes of order annexed to the summons and were as follows:

"I. The following investments and moneys, viz., (a) the "investments and moneys representing the capital of the general "funds of the corporation and (b) the investments and moneys "representing the capital of the several trusts (hereinafter called "the special trusts) mentioned in the schedule to the scheme "of which the society is the trustee shall be consolidated into "one combined pool. All the said investments and moneys as "the same may from time to time be constituted or represented "are hereinafter referred to as 'the pool.'

"II. The general funds of the society and each of the special "trusts shall be regarded and treated for all purposes as "interested from time to time in an appropriate undivided "aliquot portion of the pool.

"III. For the purposes of settling, adjusting and regulating "the respective amounts for the time being of the aliquot por-"tions of the general funds of the society and each of the "special trusts all valuations and calculations shall be made "and from time to time revised as circumstances may require "by the society.

"IV. Subject to the provisions hereinafter contained moneys "in or arising from the pool and requiring investment may be "invested in or upon any of the following investments and such "investments may be varied for others of a like nature:

"(1) Investments which at the date of investment are "authorized by law for the investment of trust moneys but "without any of the restrictions imposed by section 2 of the "Trustee Act, 1925.

"(2) Freehold land in Great Britain or leasehold land in "Great Britain held for a term of which at least 60 years are "unexpired at the date of purchase and as to both freehold and "leasehold land whether or not subject to easement or restric-"tive covenants: Provided that no investment shall be made "under this paragraph of this clause at any time when or of "such amount that the value for the time being of all the investments authorized by this paragraph held by the society as part of the pool then exceeds or would exceed one-sixth of the value for the time being of the whole pool.

"(3) (a) Securities of or guaranteed by the government of the U.S.A. or any state thereof.

"(b) The stocks, bonds, debentures or securities of any municipality, county or district council, public body, local authority, public utility company or railway situate or operating within the British Empire and Commonwealth of Nations or the U.S.A.

"(c) The debenture stock or guaranteed preference, ordinary or deferred stock or shares, or other marketable securities of any company having its registered . . . office in any part of the British Empire or Commonwealth of Nations or the U.S.A. Provided as follows:

"(i) No moneys shall be invested upon any investment mentioned in this paragraph of this clause which is not dealt in or quoted officially on one of the recognized Stock Exchanges in London, New York, Montreal or Toronto . . .

"(ii) No moneys shall be invested in any stock or shares of any company (other than a company incorporated in the U.K. carrying on banking or insurance business) which . . . carry a liability to contribute by way of calls either in the event of the company being wound up or otherwise.

"(iii) No moneys shall be invested in the ordinary or deferred shares of any company unless such company at the time of the investment has . . . a paid up capital of at least £750,000 or its equivalent at the current rate of exchange . . .

"V. No moneys shall be invested in any investment mentioned in either paragraph (2) or (3) of clause IV at any time when or of such amount that the value for the time being of all the investments authorized by either paragraph (2) or (3) held by the society as part of the pool then exceeds . . . two-thirds of the value for the time being of the whole pool."

The society was founded as an unincorporated society in 1839 and was incorporated by the Shipwrecked Fishermen and Mariners' Royal Benevolent Society Act, 1850. The principal objects of the society were to grant immediate relief to seamen of all classes suffering shipwreck, or to their widows and families in case of death, and relief and assistance to members of the society and their families. The income of the society was derived from three main sources, namely, voluntary contributions and legacies, membership payments and dividends and interest on invested funds which were now worth about £750,000. Section 11 of the Act of 1850 provided: "That any of the monies "for the time being belonging to the said corporation, may "be from time to time invested either in the name of the "said corporation or in the names of the trustees for the "said corporation; on mortgages of any manors, messuages, "lands, tenements or hereditaments of a clear and indefeasible "estate of inheritance in fee simple, in England, Wales or "Ireland, free from incumbrances except quit rents and other "small annual payments, or held upon any lease or leases for "any term or terms of years of which not less than sixty years "shall be unexpired, or in the purchase of stock in the public "funds of Great Britain or Ireland, in Exchequer Bills, South "Sea Stock or Bank Stock, and that the monies or any part of "the monies so invested may be called in, and the payment of "the same and of the interest thereof, or any part thereof "respectively, may be required and enforced when thought "advisable so to do on the part of the said Corporation: Pro- "vided, nevertheless, that no money shall be so invested on "mortgage unless, as a further security for the repayment of "the money invested and the interest thereof, the mortgage be "accompanied with a power of sale exercisable by or on behalf "of the said Corporation." The only forms of investment authorized by the section and still available were mortgages, stocks in the public funds of the United Kingdom or Exchequer Bills. There had been a steady fall over the years in the value of the society's investments. An affidavit made by a partner in a firm of merchant bankers was filed by the society expressing the opinion that the only way in which the values of funds to be held over a long period on charitable trusts could be maintained, or at any rate prevented from declining in real value, was to invest them in either land or the stocks and shares of industrial or trading companies.

G. H. Newsom Q.C. and *James A. Gibson* for the applicants. The scheme-making power of the court is exercisable in two distinct cases, namely, (i) where the declared objects of the charity have failed, cy-près, for the application of the funds to new objects, and (ii) in any case, for the better management of the charity and its property. The present application is of the latter class.

If the charity is incorporated by statute, the court cannot

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make a scheme inconsistent with the statute. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 4, p. 417, para. 868.] Certain of the expressions used in the books, and in particular in Tudor on Charities, 5th ed., pp. 178, 179, seem to suggest that the court cannot make schemes for the regulation of statutory charities at all. But this suggestion is not borne out by the cases cited in support of it: *Attorney-General* v. *Smart*,[2] *Attorney-General* v. *Middleton*[3] and *Attorney-General* v. *Governors of the Foundling Hospital.*[4] On the contrary, the court has frequently made schemes for statutory charities, sometimes even altering the objects of the charity. Thus, in the *Berkhampstead School* case[5] a charity founded in 1541 had been incorporated by statute in 1550. In 1841 and again in 1857 schemes were made radically altering the purposes of the charity. These schemes having largely failed, the court was asked to consider a supplemental scheme which, despite strong opposition, was approved by Page-Wood V.-C. No one suggested that the statute prevented his doing so. Again, in *Attorney-General* v. *Governors of Christ's Hospital*[6] Chitty J. made a scheme for the regulation of a charity incorporated by statute; (he also held that he had no power to make another scheme which had been proposed by the Attorney-General, because it was opposed by the governing body: this was the real point of this decision). The true view was expressed by Lord Cottenham L.C. in *In re Shrewsbury Grammar School*,[7] where he said, in effect, that the court has no power to allow the trustees to depart from their statutory duty, i.e., the court cannot alter the statute; but it does not follow that the court cannot confer powers additional to those given by the statute, filling up gaps in the statute. The principle is the same for statutory charities as for charities incorporated by Royal Charter, namely, the court can exercise its ordinary scheme-making powers in any way that does not conflict with the statute or the charter, as the case may be: see *In re Whitworth Art Gallery Trusts.*[8]

In the present case, if section 11 of the Act of 1850 had expressly or by necessary implication forbidden investment in any but the specified investments, the court could not have conferred additional powers of investment. But that is not the effect of section 11. In 1850 the court required all funds under its control to be invested in 3 per cent. bank annuities. This was not the result of a statutory prohibition: it was a rule of practice in the Court of Chancery. Section 11, using the word "may," allows some other forms of investment: it is an enabling section, not a restrictive one. After 1850 a series of statutes, ending with the Trustee Act, 1925, have conferred additional powers on trustees. [Reference was made to the Law of Property (Amendment) Act, 1859, the Law of Property (Amendment) Act, 1860, the Trustee Act, 1860, and the Trust Investment Act, 1889.] Nowhere in the relevant public or private legislation is there a prohibition on other modes of investment. The court is, therefore, invited to make a scheme conferring powers of investment additional to the charity's existing statutory powers.

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[2] (1748) 1 Ves.Sen. 72.

[3] (1751) 2 Ves.Sen. 327.

[4] (1793) 2 Ves. 41.

[5] (1865) L.R. 1 Eq. 102.

[6] [1896] 1 Ch. 879; 12 T.L.R. 242.

[7] (1849) 1 Mac. & G. 324, 333.

[8] [1958] Ch. 461; [1958] 2 W.L.R. 181; [1958] 1 All E.R. 176.

As to the funds held by the society on special trusts, it is clearly more convenient that they should be managed as one fund with the investments held for the society's general purposes, and just such an order as is here sought was made in *In re Royal Society's Charitable Trusts.*[9]

Denys Buckley for the Attorney-General. It is not disputed that the court can make a scheme for a statutory charity in some cases, e.g., where the provisions of the statute are no longer appropriate at all, or in relation to some matter upon which the statute is completely silent. But on matters in respect of which statutory provisions do exist, the court should be very diffident in acting; the proper course is for the governing body to seek the necessary additional powers by legislation. In this case the court is asked to act in relation to powers of investment, a matter on which the legislature has pronounced: the enabling provisions of section 11 of the 1850 Act imply the negative, that the society must not invest its funds in any other manner. Again, in giving the society the statutory powers of investment given by section 1 of the Trustee Act, 1925, Parliament has impliedly forbidden it to invest otherwise than as authorized by that section. By the existing legislation Parliament has delimited the society's powers of investment, and the court cannot interfere.

[DANCKWERTS J. But why cannot I act under section 57 of the Trustee Act, 1925?]

It was decided by Vaisey J. in *In re Royal Society's Charitable Trusts*[10] that powers of the kind which this charity seeks can be conferred by scheme but not under section 57. And, in any event, section 57 is not available to allow something to be done which is forbidden by the private Act, as is impliedly the case here. If the court is against me on the principle, I do not object to an order being made in the form that the society desires.

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[9] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

[10] [1956] Ch. 87.

Newsom Q.C. in reply. The summons asks for a scheme and is not framed under section 57 because we understood that it had been held in *In re Royal Society's Charitable Trusts* [10] that this is the correct form. But it is submitted that in conceding that the society has the powers of investment conferred on trustees generally by the Trustee Act, 1925, s. 1, the Attorney-General concedes too much. For if section 1 applies, so also does section 57. We therefore apply for leave to amend by intituling the application in the matter of the Trustee Act, 1925, and asking for relief under section 57.

DANCKWERTS J. This is a case of some general importance, because it involves a situation upon which the authorities are far from clear. It concerns the Shipwrecked Fishermen and Mariners' Royal Benevolent Society, a charity which was founded for present purposes by an Act of Parliament passed in 1850 dealing with this and certain other charities administered in connexion therewith.

The Act created a corporation and conferred upon it various powers, but the only one with which I am concerned is the power of investment, and I should like to emphasize that, in my view, it is a power, contained in section 11. [His Lordship read the section and continued:] The present application seeks to have conferred upon the corporation power to invest in a wide variety of investments, including what are sometimes called equities.

It is to be observed that at the time when this Act was passed it was the practice of the Court of Chancery to limit the permissible investment of trust funds to investment in bank annuities. It is plain that this section gave a somewhat wider range than did the Court of Chancery. It is said that the whole of this investment clause is in effect obsolete in the changed circumstances of the present time, and that the benefit and proper execution of the charitable trusts is being hampered or prevented to some extent by the limited nature of the power of investment possessed by the corporation under this Act. The charity is, of course, a statutory charity, that is to say, one

[10] [1956] Ch. 87.

founded and regulated by an Act of Parliament. In Halsbury's Laws of England, 3rd ed., vol. 4, p. 417, it is said in paragraph 868: "*Charity regulated by statute.* The court has "no jurisdiction to interfere in the administration of a charity "established and completely regulated by Act of Parliament, "unless authorized by the Act itself; but the court may make a "scheme in respect of matters not provided for by the Act, and "may enforce the observance of the provisions contained in the "Act."

It is said on behalf of persons interested in the charity that the court is empowered to make a scheme to authorize a wider range of investments in this case, because the matter is not really covered by the very limited power of investment contained in section 11 of the Act of 1850. On the other hand, it is said on behalf of the Attorney-General that that is not the right way to construe section 11 of the Act of 1850: that although in form it is a positive permission, it involves a negative prohibition and, therefore, to allow any wider power of investment of the trust funds would be to attempt to alter the statute by "a stroke of "the pen" and the court has no power to do that.

The cases to which I have been referred are far from clear, but I think the general principle which emerges is that the court cannot alter the said statute by a stroke of the pen and cannot therefore direct anything which is inconsistent with the terms of the Act of Parliament in question. The conclusion which I reach is that to allow a wider power of investment is to confer additional powers of investment and is not, therefore, inconsistent with but is in aid of and supplemental to the powers of investment which are conferred by section 11 of the Act. On that view it would be open to the court to allow what has been done by settling a scheme conferring the necessary powers.

It seems to me, however, that the matter can be dealt with in another way, and in many respects I find this alternative preferable. Since the Act of 1850 there have been a number of Trustee Acts which deal with (amongst other things) the investment of trust funds. The present Trustee Act, 1925, contains in its early part powers to invest in a number of things which are plainly outside the ambit of section 11 of the Act of 1850. It has been accepted in the present case, even by the Attorney-General, that the range of investments contained in the Trustee Act, 1925, is open to the corporation for investing its funds. To that extent, therefore, the principle has been accepted that the general Act of 1925 has modified the provisions of

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SHIPWRECKED FISHERMEN AND MARINERS' ROYAL BENEVOLENT SOCIETY, *In re.*

Danckwerts J.

section 11 of the Act of 1850. If that be so, why is it not also modified by the provisions of section 57 of the Trustee Act? It seems to me that it is. I cannot see why, if an Act is passed by Parliament 75 years after the Act of 1850, it should not be read into the earlier Act and the powers contained in the earlier Act be modified accordingly; and it seems to me that section 57 allows that to be done.

I am aware, of course, that in *In re Royal Society's Charitable Trusts*[1] Vaisey J. expressed the view that section 57 did not apply, but he did not go into the matter fully, because he found himself able to make a scheme which would produce, in the case of the trusts that were before him, exactly the same results as were asked for under the provisions of the Trustee Act. It seems to me that the provisions of section 57 do permit of the court to allow a wider range of investments to be made and to express it in a general order. [His Lordship read section 57 (1) and continued:] The word "investment" is plainly there, so that there seems to me no doubt that the court can authorize the investment by the corporation in a particular fund on a particular occasion. I also find in the subsection that the court may confer upon the trustees the power generally, and therefore I cannot see why the court may not under this power conferred upon the court by the Act give a general power to invest. It seems to me that that could be done in the present case. It really comes to the same thing as the method of a scheme. In either case the situation is one where the court is being asked to do something purely in the administration of the trust. It is not altering the substantive trusts in any way whatever; it is simply giving the trustees power, in the administration of the funds which they have under their control, to administer them in a more satisfactory and more effective way which the changed circumstances of a hundred years show to be necessary for the proper administration of the charity. Accordingly, I am prepared to allow the summons to be amended so as to be entitled "In the matter of the Trustee "Act, 1925."

[An order was made referring to section 57 and giving power under that section to carry out the proposed scheme.]

Order accordingly.

Solicitors: *Darley, Cumberland & Co.; Treasury Solicitor.*

P. P.

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[1] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

In re SIMPKIN MARSHALL LTD.

1958
July 31;
Oct. 30.

Wynn-Parry J.

[No. 00304 of 1955.]

Company — Winding up — Costs — Compulsory winding up — Solicitors' work in contemplation of proposed legal proceedings—No proceedings taken—Whether work "contentious" or "non-contentious"—Solicitors (Amendment) Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 41), *s.* 13 (4) (*a*), *replaced by Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 86 (1).

Solicitor—Costs—Lump sum or gross charge—Whether business "contentious" or "non-contentious"—Compulsory winding up—Work done in contemplation of legal proceedings—No proceedings taken.

In the course of the compulsory winding up of a company solicitors were required by the liquidator to prepare cases for counsel to advise as to (a) whether certain misfeasance proceedings should be taken, and (b) as to the recoverability of certain debts owing to the company. In the result no such proceedings were taken.

The taxing master decided that the business was non-contentious. On the hearing of a summons taken out by the liquidator to review the taxation:—

Held, (1) that since the coming into force of section 13 (4) (*a*) of the Solicitors (Amendment) Act, 1956 (now replaced by section 86 (1) of the Solicitors Act, 1957 [1]) not only all business done in the course of proceedings was to be regarded as contentious, but also all business which was done before proceedings were begun, provided that the business was done with a view to the proceedings being begun, and they were in fact begun; all other business was non-contentious.

(2) That when advice was sought in the course of a compulsory winding up for the purpose of deciding whether or not to begin legal proceedings, such advice was referable to the contemplated proceedings. If, therefore, legal proceedings were begun, the giving or procuring of such advice must be treated as contentious business, but if the legal proceedings were not begun, then the advice must be treated as having been obtained in the course of the winding up, and, accordingly, as non-contentious, whether the contemplated proceedings were to be by an independent writ or by summons in the winding up.

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

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[1] Solicitors Act, 1957, s. 86: "'Contentious business' means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act, 1950, not being business which falls within the definition of non-contentious or common form probate business contained in subsection (1) of section 175 of the Supreme Court of Judicature (Consolidation) Act, 1925. . . . 'non-contentious business' means any business done as a solicitor which is not contentious business as defined by this subsection."

1958

SIMPKIN MARSHALL LTD., *In re.*

SUMMONS to review taxation.

The following summary of the facts is taken substantially from his Lordship's judgment: This was a summons by the official receiver as liquidator of Simpkin Marshall Ltd. (hereinafter called " the company ") which was in course of compulsory liquidation, for the review of a taxation of costs for work done by the respondents, Messrs. Stafford Clark & Co., as solicitors for the company acting on the instructions of the liquidator in the course of the winding up.

The work involved the perusal of a number of documents, and the collating of the facts, followed by the preparation of two cases to counsel in order to obtain advice as to (a) whether or not any officer of the company had committed a breach of trust in relation to the company's affairs on which proceedings for misfeasance could be founded, and (b) as to the recoverability of the unexpended balance of deposits paid by the company to certain other companies. In the event no proceedings were taken under either of the above heads. In those circumstances the solicitors, treating the business as non-contentious business, delivered a lump sum bill. The taxing master accepted the view that the business was non-contentious, and taxed the bill under Schedule II of the Solicitors' Remuneration Order, 1883 (as amended by the Solicitors' Remuneration Order, 1953 (S.I. 1953, No. 117)), article 2 (*c*) of which provided that solicitors' remuneration was to be regulated by Schedule II where the work done related to certain specified conveyancing matters " and in respect of other " business not being business in any action."

The liquidator brought in objections to the basis of the taxation, contending that the business was contentious business, and, therefore, that under R.S.C., Ord. 65, r. 8, the costs were chargeable under Appendix N. The taxing master overruled the objections, and the liquidator sought a review of the taxation.

Denys B. Buckley for the official receiver as liquidator. The costs should have been taxed under Appendix N in accordance with R.S.C., Ord. 65, r. 8. Winding-up proceedings are an action within the meaning of section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925. The work done by the liquidator's solicitors is contentious business, within the meaning of section 86 of the Solicitors Act, 1957, for which no charge is prescribed by Schedule II of the Solicitors' Remuneration Order, 1883, as amended. Whether or not winding-up proceedings fall within the definition of section 225 of the Act of 1925, they are proceedings begun before a court and the business was done "in "or for the purposes of" those proceedings. The effect of a winding-up order is to continue the proceedings begun by the petition until the dissolution of the company, and all business done by a solicitor, who is an officer of the court, in the course of a winding up is done "in or for the purposes of" those proceedings; therefore, such business is contentious, and the bill of costs should be itemised, as it is under Appendix N, so that each item can be criticised as required.

The business was comparable to taking counsel's advice in an action commenced in the Queen's Bench Division by writ as to whether an interlocutory summons should be issued. If a misfeasance summons had been issued, it would have borne the heading and number allotted to the winding-up petition and been a summons in the action.

Section 237 of the Companies Act, 1948, empowers the court to appoint a liquidator, and section 245 (1) (*c*) empowers a liquidator to appoint a solicitor to assist him in the performance of his duties; the costs of such a solicitor are thus costs incurred in the winding up within the meaning of sections 267 and 309 of the Act of 1948. A similar bill, if presented in the county court, would, by virtue of rule 192 of the Companies (Winding-up) Rules, 1949 (S.I. 1949, No. 330), be taxed under Appendix N, and the intention of the legislature must have been to place the taxation of costs in the High Court and the county court on the same basis. The practice has always been to tax the costs of a solicitor employed by a liquidator in a compulsory winding up in accordance with Ord. 65, r. 8; only the costs of conveyancing business have been taxed under the General Order: *Stanford* v. *Roberts*[2] and *In re Merchant Taylors' Co.*[3] It is still the practice to tax the costs of a winding-up petition in accordance with Appendix N, and this indicates the court's view that winding-up proceedings are within the scope of Appendix N. Further, Appendix N contains some items which are applicable only where a company is being wound up compulsorily; from this it might be concluded that all charges by a solicitor for work done in a compulsory winding up should be taxed under Appendix N.

E. Milner Holland Q.C. and *L. H. L. Cohen* for the solicitors. The costs have been rightly taxed under Schedule II of the Solicitors' Remuneration Order, 1883, as amended. Winding-up proceedings are not an action within the meaning of section 225 of the Judicature Act, 1925. The procedure on applications under the Companies Act, 1948, is laid down in Order 53B and the Companies (Winding-up) Rules, 1949. These Rules make no provision as to the manner in which winding-up proceedings are to be commenced. Such provision is enacted in section 224 of the Companies Act, 1948, which provides that applications to the court for winding up shall be by petition presented as therein described. Therefore, as the proceedings are not commenced by writ or in a manner prescribed by rules of court, they are not an action within the meaning of section 225 of the Judicature Act, 1925.

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[2] (1884) 26 Ch.D. 155.

[3] (1885) 30 Ch.D. 28.

"Contentious business" was defined by section 81 (1) of the Solicitors Act, 1932, as including "any business done by a "solicitor in any court, whether as a solicitor or as an advocate," and this definition was replaced by section 13 (4) (*a*) of the Solicitors (Amendment) Act, 1956, which in turn was replaced by an identical definition in the Solicitors Act, 1957, s. 86 (1). "Business done . . . in or for the purposes of proceedings begun "before a court" postulates substantive proceedings taken to enforce a particular remedy not the subject of any other proceedings. It means that if the work is done, and there are no proceedings, the business is non-contentious. If proceedings result or have already begun for the enforcement of the particular remedy, the matter is contentious.

The argument that work done in seeking counsel's opinion as to the issue of a misfeasance summons is comparable with taking counsel's advice in a Queen's Bench action as to whether an interlocutory summons should be issued is based on a false analogy. The work done in obtaining advice on the issue of a Queen's Bench summons would be in furtherance of the relief asked for in the action and would be contentious, but the advice as to a misfeasance summons would relate to a fresh substantive proceeding which is not referable to any relief asked for in a winding-up petition; it would not therefore be contentious business unless and until the misfeasance proceedings were begun.

Buckley replied.

Cur. adv. vult.

October 30. WYNN-PARRY J., reading his judgment, stated the facts and continued: The first ground put forward on behalf of the applicant can, I think, be quickly disposed of. He contends that the winding-up proceedings are an action within the meaning of that word in section 225 of the Supreme Court of Judicature

(Consolidation) Act, 1925, which provides that: "'Action' "means a civil proceeding commenced by writ or in such other "manner as may be prescribed by rules of court, but does not "include a criminal proceeding by the Crown." A petition for the compulsory winding up of a company does not fall within this definition because in the first place a petition is not a writ of summons, and in the second place the form of proceeding is prescribed in the relevant statute, the Companies Act, 1948, s. 224, and not in either the Rules of the Supreme Court or the Companies (Winding-up) Rules, 1949.

The main point, however, which was argued, was whether or not the business in question was contentious business. For the solution of this question one must first turn to section 86 (1) of the Solicitors Act, 1957, replacing section 13 (4) (*a*) of the Solicitors (Amendment) Act, 1956. [His Lordship read the section and continued:] On this definition of contentious business it was contended on behalf of the applicant that, irrespective of the question whether or not the proceedings begun by petition for the compulsory winding up of the company are within the definition of action in section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, they are proceedings begun before a court. I accept this submission. Then comes the critical question: Was the business done "in or for the purposes of those proceedings"? The main contention of the applicant is built up in this way. First, it is said, the effect of the court making a winding-up order is to continue the proceedings begun by the petition until the final dissolution of the company. I accept this step. From this it is argued that all business done by a solicitor in the course of the winding up is done in or for the purposes of those proceedings: ergo such business is contentious business as defined in section 86 (1) of the Solicitors Act, 1957.

In the ordinary course, business consisting of advising whether or not proceedings should be started is non-contentious business, and only becomes contentious business if proceedings are in fact started: hence the necessity in defining contentious business to include not only the preposition "in" but also the words "for the "purposes of." It will thus be seen that in the ordinary case the test of whether the business of advising on the question of bringing proceedings is to be regarded as contentious business depends on the course taken subsequently to the advice being given. It must follow from the argument of the applicant that, supposing the business done is advising whether or not a writ of summons should be issued, the nature of that business is not to be tested by posing the question, were the proceedings in fact begun as a result of the advice? The question is answered as soon indeed as the business of advising is undertaken, because it is done " in " existing proceedings.

The matter does not rest there. Carried to its logical conclusion the argument of the applicant must cover every type of business done by a solicitor in a compulsory liquidation, including such essentially non-contentious work as conveyancing. In his objections the applicant said this: " It is understood that the " practice has always been to tax the costs of solicitors employed " by the liquidator in a compulsory winding up in accordance with " Ord. 65, r. 8, which provides that in ' causes and matters " ' . . . solicitors shall be entitled to charge and be allowed the " ' fees set forth . . . in Appendix N.' Only the costs of con-" veyancing business have been taxed under the General Order " (in accordance with Ord. 65, r. 27, regulation 30). This practice " is supported by the decision in *Stanford* v. *Roberts*." [1]

Prima facie it might be argued that Order 65 was intended to deal only with contentious business, and that regulation 30 of Ord. 65, r. 27, was in the nature of a mopping-up provision and did not include work and labour of a non-contentious nature. But, as appears from the passage from the objections which I have quoted, reliance is placed on the decision of Kay J. in *Stanford* v. *Roberts*.[1] In that case Kay J. had to consider the effect of section 2 of the Solicitors' Remuneration Act, 1881, and the General Order of 1882 made thereunder. Section 2 gave authority to the Lord Chancellor and the other persons named to make a general order " for prescribing and regulating the remuneration " of solicitors in respect of business connected with sales, " purchases, leases, mortgages, settlements and other matters of " conveyancing, and in respect of other business not being busi-" ness in any action." The General Order made in August, 1882, contained in rule 2 the above language from section 2: and it will be observed that so does rule 2 of the Solicitors' Remuneration Order, 1883. Kay J. decided that the words " not being " business in any action " qualified only the immediate antecedent " in respect of other business," and therefore section 2 and the General Order of 1882 covered conveyancing matters in an action as well as conveyancing matters out of court. His decision was approved by the Court of Appeal in *In re Merchant Taylors' Co.*[2]

As the language of rule 2 of the Solicitors' Remuneration

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[1] (1884) 26 Ch.D. 155.

[2] (1885) 30 Ch.D. 28.

Order, 1883, is similar to that of the General Order of 1882, no doubt the reasoning of the judgment in *Stanford* v. *Roberts*[3] applies to the former.

It is to be observed that Kay J. was not concerned to decide whether conveyancing matters in an action were to be regarded as contentious matters or non-contentious matters. All he had to decide was the short question of construction under section 2 of the Solicitors' Remuneration Act, 1881, whether the conveyancing matters mentioned in that section included conveyancing matters in an action.

Section 81 (1) of the Solicitors Act, 1932, defined contentious business as including " any business done by a solicitor in any " court, whether as a solicitor or as an advocate." This is a narrow definition and would appear to recognise that conveyancing business done in or for the purposes of an action was not to be regarded as contentious business. It would thus support the practice to which I have referred. In 1957, however, the Solicitors Act was passed and came into force on July 15, 1957, applying to all bills delivered on or after that date. It therefore applies to this bill which was delivered on November 21, 1957. I have read the definition of contentious business contained in section 86 of that Act. This definition is very much wider in scope than the definition in the Act of 1932, and in my view, assuming that prior to November 1, 1956, conveyancing business done in an action was non-contentious business, the position was changed on that date by the coming into force of the Solicitors (Amendment) Act, 1956. It appears to me that the definition of contentious business in that Act and the Solicitors Act, 1957, must include conveyancing business done in an action. The scope of the Solicitors' Remuneration Order, 1883, must therefore be treated for the future as not extending to conveyancing business done in an action, the phrase " in or for the purposes of proceed- " ings begun before a court " clearly including conveyancing business done in an action. This result, assuming it to be correct, as I hold that it is, may be said to have been achieved in an odd way, but there is this advantage, that there is now a clear and, I should have thought, logical division between contentious and non-contentious business. All business is now to be regarded as contentious which is done before proceedings are begun provided that the business is done with a view to the proceedings being begun, and they are in fact begun, and also all business done in the course of the proceedings. All other business is non-contentious.

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[3] 26 Ch.D. 155.

The relevance of the foregoing analysis is that it shows that for the applicant to succeed he must show that every piece of business, of whatever nature, which is done by a solicitor in the compulsory liquidation of a company on the instructions of the liquidator is contentious business. Now the result of accepting the validity of this proposition would be to point a very sharp distinction between business done by a solicitor in a compulsory winding up and business done by a solicitor in a voluntary winding up. In the case of a voluntary winding up there is no ground for saying that business consisting of advising the liquidator as to whether or not proceedings should be begun is anything but non-contentious business, unless the proceedings are in fact begun. But if the applicant's contention is correct then the mere existence of the proceedings leading up to the order for compulsory winding up makes all business done by a solicitor during the course of the winding up contentious business.

I have found the question which is raised by this summons to be a really difficult one. Two minds could with much show of reasoning take opposite views. Further, as I shall show later, the whole question can easily be resolved for the future by administrative action. However, it is my duty to pronounce on the question before me and I shall proceed to do so.

As I have said earlier in this judgment, the result of presenting a petition for the compulsory winding up of a company is that proceedings have been begun before a court. The relief asked by the petition is that the company should be wound up by the court. Upon the making of the order the proceedings thus begun are not exhausted: they continue until the company is finally dissolved. This is necessary in order to continue the jurisdiction conferred on the court by the making of the order for winding up. Throughout the period of winding up the affairs of the company the jurisdiction of the court to control the winding up continues, and it continues by virtue of the legal proceedings begun by the presentation of the petition and the order to wind up. As a result of the making of the order there are brought into operation all the provisions of the Companies Act, 1948, relating to a compulsory winding up.

Section 237 of that Act provides: "For the purpose of con-"ducting the proceedings in winding up a company and perform-"ing such duties in reference thereto as the court may impose, "the court may appoint a liquidator or liquidators." In that section the word "proceedings" has a wider import than the phrase "legal proceedings." It includes all the steps which must be taken by the liquidator in order to achieve the object of the order of the court, viz., the winding up of the affairs of the company, leading to its eventual dissolution. By section 245 (1) of the Act it is provided that "The liquidator in a winding up by the "court shall have power, with the sanction either of the court or "of the committee of inspection (*a*) to bring or defend any action "or other legal proceeding in the name and on behalf of the "company" and "(*c*) to appoint a solicitor to assist him in the "performance of his duties."

Let me consider first a case in which with the sanction of the committee of inspection the liquidator takes legal proceedings, which are begun by writ of summons. Put aside for the moment any advice which may have been given by the solicitor to the liquidator prior to the issue of the writ. Then let the question be asked: Is the business which the solicitor conducts in the action in or for the purposes of that action or is it in or for the purposes of the legal proceedings begun by the petition for the winding up of the company? To my mind the answer must be that the business is done in or for the purposes of the action. Then the question must be asked: Assuming the liquidator obtained advice prior to the issue of the writ, was that advice obtained in or for the purposes of the legal proceedings begun by the petition or for the purposes of the action postulated? To my mind the answer is that he obtained the advice for the purposes of the action. The advice is not referable to the relief claimed in the petition. It was obtained for the purposes of the proceedings in the winding up, using the word in the sense in which it is used in section 237 of the Companies Act, 1948. The advice was obtained for the purpose of deciding whether or not to begin substantive legal proceedings and is therefore referable to those legal proceedings. If, therefore, legal proceedings are begun, the business involved in giving or procuring the advice must be treated as contentious business: but if legal proceedings are not begun, then the advice must be treated as having been obtained in the course of the proceedings (using the word in its wide sense) in winding up, and must therefore be treated as non-contentious business.

The question then arises: Is there any difference between legal proceedings begun in the course of a compulsory winding up by writ and such proceedings begun by summons entitled with the same heading as that in the petition for an order for the compulsory winding up? Proceedings of this nature fulfil the conditions of section 245 (1) (*a*) of the Companies Act, 1948, because they are taken in the name and on behalf of the company. They are begun when and only when the necessary summons is issued. They are brought in order to obtain the substantive relief claimed, and that relief is claimed for the purposes of the winding up and not for the purposes of the proceedings in which the winding-up order was obtained.

The words of the definition of contentious business, however, are " in or for the purposes of proceedings begun before a court." The disjunctive conjunction " or " is used and so the question must be answered, What is the effect of taking out a summons in the winding up which, by the rules of procedure, is entitled " In the " legal proceedings which led to the making of the order for winding up, which proceedings continue in being until the final dissolution of the company concerned? In my view the answer must be that if any such summons is taken out it must be regarded as taken out in those proceedings even though it asks for substantive relief. That, however, does not conclude the matter. If I am right in my conclusion that in the case where proceedings have to be begun by writ, the business of advising is referable to the proceedings, if begun, for the purpose of deciding in what proceedings that business is to be regarded as contentious business, then I can find no good ground for not applying the same reasoning to the case of advice given leading to the issue of a summons entitled in the proceedings begun by the petition. In my view the business of giving such advice only becomes contentious business in such proceedings by virtue of the issue of such summons. It follows that if no such summons is issued the business of advising remains non-contentious business.

If the contrary view were to prevail, the result would be both inconvenient and odd. It would mean that the method of taxing the costs of obtaining the advice under head (*a*), that is, whether misfeasance proceedings should be begun, would be taxed under Appendix N, while the costs of obtaining advice under head (*b*), where proceedings if taken would have to be begun by writ, would be taxed under the Solicitors' Remuneration Order, 1883.

I have not failed to take note of the fact that Appendix N contains items which are applicable only where a company is being wound up compulsorily. It was argued that the presence of those items in Appendix N was a pointer to the conclusion that all charges by a solicitor for work done in a compulsory winding up should be taxed under Appendix N. The argument is attractive, but I do not find it conclusive. It can be said with equal force that the items should not have been included in Appendix N at all.

A further argument addressed to me was based on rule 192 of the Companies (Winding-up) Rules, which provides that in a county court all costs properly incurred in a winding up by the court are chargeable on the lower scale in Appendix N. It was then said that the intention of the legislature must have been to place the taxation of costs in the county court and the taxation of costs in the High Court on the same basis. If that had been the intention it would have been easy to say so: but the introduction of rule 192 does not lead to the conclusion, as a necessary conclusion, that the intention of the legislature was as is suggested.

It can be argued with much force that by referring only to proceedings in a county court, the legislature intended that costs in the High Court should be dealt with on a different basis.

As I have already said, I have found the whole matter one of great difficulty, and I recognise that a different view could well be entertained. Only one thing is certain and that is that the position is far from clear. Whether or not all costs properly incurred in a winding up by the High Court should be taxed under Appendix N is a matter of policy, on which it is not for me to pronounce. I would, however, point out that if it were to be decided that that policy should be followed, it can be achieved by a short amendment to the Companies (Winding-up) Rules, 1949.

Summons dismissed.

Solicitors: *Solicitor to the Board of Trade; Stafford Clark & Co.*

LONDON COUNTY COUNCIL *v.* MONKS.

1958
Nov. 26.

Danckwerts J.

[1958 L. 913.]

Practice—Payment into court—Payment out—Enforcement of judgment —Judgment recovered by creditor in county court—Fund lodged in High Court to credit of judgment debtor—Application to High Court for charging order on fund in respect of judgment in county court—Jurisdiction—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 12

—*County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 136 (1) (2)—*Administration of Justice Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 34 (3).

The defendant was awarded £2,000 compensation, in relation to a compulsory purchase, which was lodged in the High Court to her credit. Later the London County Council took proceedings in the county court to recover the cost of her maintenance, and recovered judgment for £292 14s. 9d. and £10 2s. costs.

On a summons by the London County Council asking that the sum of £2,046 5s. 2d., being the compensation money with accrued interest, stand charged with payment to the London County Council of the £302 16s. 9d.:—

Held, (1) that it was not the practice of the court to make an order on the Paymaster-General in respect of a fund in the High Court in order to enforce a judgment of an inferior court; and (2) that, as the power to remove county court proceedings by certiorari into the High Court under section 136 of the County Courts Act, 1934,[1] had been terminated by the repeal of that section by section 34 of the Administration of Justice Act, 1956, there was now no power to satisfy a county court judgment out of a fund lodged in the High Court by directing a payment out or by making a charging order.

Brereton v. *Edwards* (1888) 21 Q.B.D. 488 and *In re Prior* [1921] 3 K.B. 333 considered.

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[1] Judgments Act, 1838, s. 12: "Be "it enacted that by virtue of any "writ of fieri facias to be sued out "of any superior or inferior court "after the time appointed for the "commencement of this Act, or "any precept in pursuance thereof, "the sheriff or other officer having "the execution thereof may and shall "seize and take any money or bank-"notes (whether of the . . . Bank of "England, or of any other bank or "bankers), and any cheques, bills of "exchange, promissory notes, bonds, "specialties, or other securities for "money belonging to the person "against whose effects such writ of "fieri facias shall be sued out. . . ."

County Courts Act, 1934, s. 136: "(1) A judge of the High Court, if "satisfied that a person, against "whom judgment for an amount "exceeding £20 has been obtained "(whether by way of satisfaction of "a claim or counterclaim or by way "of costs or otherwise) in a county "court, has no goods or chattels "which can be conveniently seized to "satisfy the judgment, may, if he "thinks fit, and on such terms as to "costs as he may direct, order a writ "of certiorari to issue to remove the "judgment into the High Court. "(2) When a judgment is so "removed, it shall have the same "force and effect and the same pro-"ceedings may be had thereon as if "it were a judgment of the High "Court. . . ."

Administration of Justice Act, 1956, s. 34: "(3) Section 136 of the "County Courts Act, 1934 (which "relates to the removal to the High "Court of a county court judgment "where the judgment debtor has no "goods or chattels which can be con-"veniently seized to satisfy the judg-"ment) shall cease to have effect."

S. 35 (1): "The High Court and "any county court may, for the pur-"pose of enforcing a judgment or "order of those courts respectively "for the payment of money to a "person, by order impose on any such "land or interest in land of the "debtor as may be specified in the "order a charge for securing the pay-"ment of any moneys due or to be-"come due under the judgment or "order."

ADJOURNED SUMMONS.

The following statement of facts is taken in substance from the judgment of Danckwerts J.

In 1947 the London County Council made a compulsory purchase order in relation to a dwelling-house of which the owner and occupier was the defendant, one Miss Monks, which was followed up by a notice to treat served on her on September 14, 1949. On December 22, 1954, the Lands Tribunal awarded her compensation in the sum of £2,000 and, on September 19, 1955, the London County Council having duly acted in accordance with the procedure laid down by the Lands Clauses (Consolidation) Act, 1845, the £2,000 was lodged in court. On October 10, 1955, notice of entry was given.

Miss Monks refused to move out, and the sheriff had to take possession, which he did on February 15, 1956. Thereupon Miss Monks was removed to a hostel and maintained there by the London County Council until May 24, 1957, when she left and went to Blackpool.

Sections 21 and 22 of the National Assistance Act, 1948, required the London County Council to recover the costs of maintenance which, in the case of Miss Monks, amounted to £292 14s. 9d. To recover that sum the council took proceedings in the Lambeth County Court and, on February 21, 1958, recovered a judgment for £292 14s. 9d. and £10 2s. for costs, a total of £302 16s. 9d.

By this summons, taken out on May 12, 1958, the London County Council asked for an order that the sum of £2,046 5s. 2d. (being the sum paid into court together with accrued interest) stand charged with payment to the London County Council of £302 16s. 9d., being the amount of the county court judgment together with £10 2s. costs.

S. L. Newcombe for the London County Council as applicants. Under the old procedure it was usual to remove a judgment into the High Court and to obtain a charging order under section 12 of the Judgments Act, 1838: see County Courts Act, 1934, s. 136. The charging order is not under section 14 of the Judgments Act, 1838, which relates to stocks and shares, not to "money." The power to remove county court proceedings by writ of certiorari into the High Court under section 136 of the County Courts Act, 1934, was ended when that section was repealed by section 34 of the Administration of Justice Act, 1956. It is important to

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London County Council v. Monks.

note that the relevant section of the Judgments Act, 1838, is section 12, not section 14, which relates to superior courts only. Where there is a fund in court the court will, certainly where there has been a High Court judgment, either order payment out or make a charging order in the judgment creditor's favour. It is submitted that this court has general jurisdiction to make the order which the applicants now seek, notwithstanding that the judgment was in county court proceedings. [Reference was made to *Brereton* v. *Edwards*[2] and *In re Prior*.[3]]

The respondent was not represented and did not appear.

Danckwerts J., saying that this application raised a point of very considerable difficulty and of some importance, stated the facts and continued: This is an application for an order that the sum of £2,046 5s. 2d. stand charged with payment to the London County Council of the sum of £302 16s. 9d.

The practice before the Administration of Justice Act, 1956, was that the proceedings in the county court were removed to the High Court of Justice by writ or order of certiorari, and the reason for that was that, under section 151 of the County Courts Act, 1888 (subsequently re-enacted by section 136 of the County Courts Act, 1934), there was power in that way to make the judgment of the county court equivalent to a judgment of the High Court.

Section 136 provided: "(1) A judge of the High Court, if "satisfied that a person, against whom judgment for an amount "exceeding £20 has been obtained (whether by way of satis-"faction of a claim or counterclaim or by way of costs or other-"wise) in a county court, has no goods or chattels which can be "conveniently seized to satisfy the judgment, may, if he thinks "fit, and on such terms as to costs as he may direct, order a "writ of certiorari to issue to remove the judgment into the "High Court."

Subsection (2) provided: "When a judgment is so removed, "it shall have the same force and effect and the same proceed-"ings may be had thereon as if it were a judgment of the High "Court . . ."

Under that section it was open to the judgment creditor to proceed in the High Court to enforce the county court judgment in the same way as he would have in the High Court of Justice with regard to a High Court judgment; and, of course, the

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[2] (1888) 21 Q.B.D. 488.

[3] [1921] 3 K.B. 333.

Judgments Act, 1838, would apply in the manner available under that Act.

I should refer to section 14 of the Judgments Act, 1838, which enables government stock and funds and stock and shares in public companies belonging to the debtor to be charged by order of the judge in favour of a judgment creditor. That section refers only to any judgment which has "been entered up in any "of Her Majesty's superior courts at Westminster." There is also section 12, which enables proceedings under fieri facias to be taken. It provides: "Be it enacted that by virtue of any writ "of fieri facias to be sued out of any superior or inferior court "after the time appointed for the commencement of this Act, "or any precept in pursuance thereof, the sheriff or other officer "having the execution thereof may and shall seize and take any "money or banknotes (whether of the . . . Bank of England, or "of any other bank or bankers), and any cheques, bills of "exchange, promissory notes, bonds, specialties, or other "securities for money belonging to the person against whose "effects such writ of fieri facias shall be sued out . . ."

I need not read the rest of that section, but it is necessary to point out that in that section "inferior court" is referred to as well as "superior court." On the other hand, it would appear that the right to seize money or banknotes means cash in the form of coins or notes, and would not, for instance, apply to a bank account, which, of course, is really a chose in action, being a debt owed by the bank on the current account to its customer, and which can be reached in the appropriate manner by garnishee proceedings.

Money in the hands of the Paymaster-General at the bank would seem to me to be in the same position as any other bank account; but there is a line of authorities to which I have been referred which show that in the case of a fund in court, as it is commonly called, at any rate in the case of a High Court judgment, the court would direct payment out or make a charging order in favour of a High Court judgment creditor. Those cases are *Brereton* v. *Edwards* [1] and *In re Prior*,[2] the latter case being the case of a fund which, I think, had been paid to the official receiver in bankruptcy.

The real basis of those cases seems to me to be that, where the court has the fund under its own control, as in the case of a fund standing to the credit of some account of the Paymaster-

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[1] (1888) 21 Q.B.D. 488.

[2] [1921] 3 K.B. 333.

General, the Paymaster-General being the officer of the High Court and all the judges of any Division of the High Court being judges of that court, the judges will enforce a High Court judgment by directing their officer to pay out the money or by making a charging order on the fund in question, so that the judgment creditor shall not be defeated with regard to satisfaction of the judgment.

That was in accordance with the practice of the old Court of Chancery, it appears, before the Judicature Acts came into force: but the question is, does that practice also exist with regard to a judgment creditor who is claiming, not under a High Court judgment but under a judgment of some inferior court, a county court for instance? I am not satisfied that it does, and it seems to me that the provisions of the County Courts Act indicated the contrary because they provided for a county court judgment being made equivalent to a High Court judgment by transfer to the High Court of Justice. The point is that by section 34 of the Administration of Justice Act, 1956, section 136 of the County Courts Act, 1934, has been repealed.

Section 34 provides: "(3) Section 136 of the County Courts "Act, 1934 (which relates to the removal to the High Court of a "county court judgment where the judgment debtor has no goods "or chattels which can be conveniently seized to satisfy the "judgment) shall cease to have effect." It would appear that the reason for the passing of that provision was that the section was dealing with the abolition of the writ of elegit, and that the Act of 1956 was providing by section 35 (1) powers by which "The High Court and any county court may, for the purpose of "enforcing a judgment or order of those courts respectively for "the payment of money to a person, by order impose on any such "land or interest in land of the debtor as may be specified in the "order a charge for securing the payment of any moneys due or "to become due under the judgment or order."

There was, therefore, being provided a different method of securing payment out of land or out of proceeds of land on a judgment which had been obtained in the appropriate court. It may be that the draftsman of the Act had overlooked the fact that, in providing for the repeal of section 136 of the County Courts Act, 1934, he might be affecting also the provisions applicable to a fund in the High Court in the hands of the Paymaster-General.

Whether that is so or not is, of course, pure speculation. I have to deal with the situation as I find it, and it seems to me that as section 136 has been repealed there is no method of removing the county court proceedings to the High Court so as to be equivalent to a High Court judgment, and that being so, there is no method by which the funds in the hands of the Paymaster-General can be reached.

It seems to me an unfortunate result because, of course, the judgment ought to be satisfied if the debtor has a fund, but I am forced to the conclusion that the court does not in practice make an order on the Paymaster-General in the case of a judgment of an inferior court, and no authority has been produced to me which would justify my making an order for payment out of funds in court in the present case.

Summons dismissed.

Solicitor: *J. G. Barr, Solicitor, London County Council.*

K. R. A. H.

In re BACHARACH'S WILL TRUSTS.
MINDEN *v.* BACHARACH AND OTHERS.

[1958 B. 2328.]

1958
Nov. 19, 26.

Vaisey J.

Will—Construction—Omission—Trust to divide income into four equal parts "one part to each of my children and two parts to my "wife . . . as shall survive me until the children attain the age of "23 years . . ."—Trusts of half of residuary estate for testator's children and their issue—Absolute gift of whole estate to wife on failure of testator's issue—Extent of wife's interest in her two equal fourth shares—Power of court to transpose words of will.

A testator, after directing that his business should not be sold without his wife's consent, devised and bequeathed his residuary estate on trust "to pay and apply the annual income arising there-"from to be divided into four equal parts one part to each of my "children and two parts to my wife N. (née F.) as shall survive me "until the children attain the age of 23 years and if more than one "child in equal shares and if and when each of my said children "shall attain the age of 23 upon trust to pay and apply one quarter "of my residuary estate to such child for his or her own use and "benefit absolutely but if only one of my said children shall "survive me and shall live to attain the age of 23 years then to "pay and apply the half of my residuary estate to such child for "his or her use and benefit absolutely." The will also created trusts of half of the residuary estate for the testator's issue and, on failure of his issue, a gift to the wife of his whole estate absolutely.

On the hearing of a summons taken out to ascertain the extent of the wife's interest under the will:—

Held, (1) that, though the wording of the will was confused through something having been inadvertently omitted or inserted, or through the words having been disarranged, it was clear in the context that the testator's intention was that the wife was to take two of the four shares absolutely under an indefinite gift of income.

In re Smith [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708 considered.

(2) That in such circumstances it was legitimate to re-arrange the language of the will by a transposition of the words so that it should read "two parts to my wife N." before and not after "one "part to each of my children"; such a transposition made in order to produce sense being allowable in the case of a will as in the case of a statute.

Love v. *Norman Wright (Builders) Ltd.* [1944] K.B. 484; 60 T.L.R. 349; [1944] 1 All E.R. 618 applied.

(3) That, accordingly, the wife took a one-half share of the residue.

In re Smith (supra); *In re Follett* [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22, and *In re Whitrick* [1957] 1 W.L.R. 884; [1957] 2 All E.R. 467 applied.

Per curiam: If other re-arrangements of the words could have been suggested as producing an equally reasonable and probable disposition of the estate, an intestacy would have resulted, as the court would have no power to choose between alternatives in such a case.

ADJOURNED SUMMONS.

The following statement of the facts is taken in substance from the judgment.

The plaintiff was the sole executor and trustee of the will, dated November 14, 1956, of the testator, Leo Bacharach, who died on December 31, 1957, leaving a widow, the defendant, Nora Bacharach, and two children, issue of a former marriage, the defendants, Robin Michael Bacharach, and Evelyn Claire Bacharach, of whom the former was just of age and the latter still an infant. His will was proved by the plaintiff on April 3, 1958, and the net value of his estate was sworn as being upwards of £17,000.

After bequeathing certain pecuniary legacies, the testator devised and bequeathed his residuary estate on trust for sale, subject to a direction that his business of a leather factor's merchant should not be sold without his wife's consent, and to stand possessed of the proceeds and resulting investments and property, called his residuary estate, on trust "to pay and apply "the annual income arising therefrom to be divided into four "equal parts one part to each of my children and two parts to "my wife Nora (née Fainstein) as shall survive me until the "children attain the age of 23 years and if more than one child in "equal shares and if and when each of my said children shall "attain the age of 23 upon trust to pay and apply one quarter of "my residuary estate to such child for his or her own use and "benefit absolutely but if only one of my said children shall "survive me and shall live to attain the age of 23 years then to "pay and apply the half of my residuary estate to such child for "his or her use and benefit absolutely."

Then followed two provisos. The first was that if either of his children should die in his lifetime or before attaining the age of 23 leaving a child or children who should survive him or her, such child [*sic*] should take, and if more than one equally between them the share in his residuary estate which his her or their [*sic*] parent would have taken if such parent had survived the testator and lived to attain a vested interest under his will. The second proviso was that if both of the testator's said children should die in his lifetime without leaving issue his entire estate consisting of the four shares before mentioned should be for the use and benefit of the testator's said wife.

By this summons the trustee asked, inter alia, whether, on the true construction of the will, two equal fourth parts of the residuary estate were held on trust for the widow absolutely; or to pay the income of it to her during her life; or to pay it to her until both the son and the daughter attained the age of 23 years; or to pay it to her until one of them attained that age.

G. M. Parbury for the trustee.

A. C. Sparrow for the widow. On the true construction of the will, the widow takes half of the residuary estate absolutely. There are two ways in which the court can reach that construction, namely, by transposition and by supplying words which have clearly been omitted. It can do so by transposition because the provision as it stands does not make sense; it does, however, make sense if the court effects a simple transposition of two clauses and then reads the passage: "upon trust to pay and "apply the annual income arising therefrom to be divided into "four equal parts two parts to my wife Nora (née Fainstein) and "one part to each of my children Robert Michael and Evelyn "Claire as shall survive me until the children shall attain the age "of 23 years . . ." The resulting indefinite gift of income is equal to a gift of capital. The court is entitled to make a transposition where the clauses of a will "lie shuffled together in a confused "heap": *Hudson* v. *Bryant.*[1] It has even transposed sections in an Act of Parliament: *Love* v. *Norman Wright* (*Builders*) *Ltd.*[2]

The court can reach the true construction by supplying words which have clearly been omitted provided that the testator's meaning is reasonably clear; it is not necessary to know the precise language which he must be deemed to have had in mind: *In re Whitrick.*[3] It is clear from the concluding provisions of the will that the testator thought that he had divided his estate into four shares of capital. Two went to the children. Clearly he intended the remaining two to go to the widow.

A. A. Baden Fuller for the children. The widow takes either an interest in the income until both children attain—or, alternatively, until one attains—the age of 23 years, or, at the most, a life interest in the income of the two shares which it has been contended that she takes absolutely. Subject to that, those two equal fourth parts are undisposed of by the will.

The principles applicable to transposing words in a will to effectuate an intention are equally applicable to supplying words in a will to do so. For it to be proper to supply words it is not enough for the court to be satisfied that the testator has left some out. It must also be clear what words he meant to put in. The principle was stated by your Lordship in *In re Smith,*[4] which was approved in *In re Follett.*[5] Reliance is placed on all the judgments in that case, especially those of Evershed M.R. and Romer L.J.

Here, the words, though not wholly apt, clearly give the widow at least the income of the two shares, but she gets no greater interest unless some words are supplied or transposed. Even if words giving her an absolute interest in them be supplied, there may still be an intestacy if both children die under the age of 23 years without issue. The testator could quite sensibly have intended to dispose of his estate—so far as he has not already done so—between his wife and children in many other ways than by giving it to his wife absolutely.

[VAISEY J. There may be a different implication if the conflict is not between a widow and children but between a widow and more distant relations, as in *In re Smith*.[6]]

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[1] (1845) 1 Coll. 681, 685.

[2] [1944] K.B. 484, 489; 60 T.L.R. 349, 350; [1944] 1 All E.R. 618, 620.

[3] [1957] 1 W.L.R. 884; [1957] 2 All E.R. 467.

[4] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.

[5] [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22.

In this will the words could be transposed in several different ways, all grammatically accurate, each giving a different result.

[VAISEY J. You are saying, in effect, that it must not be like a kaleidoscope which, when shaken, always gives a different pattern; for a transposition to be valid, the result must always be the same, whichever transposition is chosen.]

This case is merely another example of a testator's having failed to dispose of his estate in every possible event. A partial intestacy follows by operation of law and the court cannot speculate on what disposition the testator might have made had his attention been called to the incompleteness of his will.

Cur. adv. vult.

November 26. VAISEY J. stated the facts and continued: It is obvious that the passage of the will which I have quoted consists, especially at the beginning of the passage, of an extraordinary jumble of words for which it is difficult to account, for the probate includes a photograph of the original will which was a neatly typewritten document bearing every superficial indication of having been carefully prepared for signature.

This summons concerns the two equal fourth shares in which the widow takes an interest under the will, and the question is, what interest? Several suggestions are made, such as (1) that the widow takes the two shares absolutely; (2) that she takes only a life interest in the income, and (3) that she takes such income only until both the testator's children attain, or, alternatively, until one of them attains the age of 23 years. If either of suggestions (2) or (3) is adopted, the further question arises as to the destination of the two shares when the widow's interest in them comes to an end.

There is evidently something very wrong about the wording of the will. Something has been inadvertently omitted, or inadvertently inserted, or the words have been disarranged. The question is whether I can discover from the words as they stand what the testator's meaning was without speculating any further than was held to be permissible in *In re Smith*,[1] for I have, of course, no power to rectify the document, or to do anything but construe it as it stands.

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[6] [1948] Ch. 49.

[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.

1958

Bacharach's Will Trusts, *In re.*

Vaisey J.

I have a strong impression amounting, I think, to a conviction, that the widow was intended to take the two shares absolutely under an indefinite gift of income. That view seems to me to be supported by the circumstance that her consent is required to the sale of the testator's business, and by the absolute gift to her of the whole estate on failure of the testator's issue, and by the ingenious suggestion of the widow's counsel that the words "two parts to my wife Nora" should have preceded instead of following the words "one part to each of my children." If such a re-arrangement were made, the difficulty would disappear, for everything which came after the reference, in its new place, to the widow's two parts would be dealing appropriately and naturally with the children's two parts. I am not aware that the expedient of shuffling the words in a will to make them intelligible has ever been resorted to, but I do not see why it should not, in a proper case, be permitted.

I have been referred to *Love* v. *Norman Wright (Builders) Ltd.*,[2] where the words of a statute were transposed in order to make them make sense, or better sense, and, if this could be done in the case of a statute, it must surely be allowable in the case of a will. In holding that the widow takes her two shares absolutely, I am relying on *In re Smith*,[3] *In re Follett*[4] and *In re Whitrick*.[5] If other re-arrangements of the words could have been suggested as producing an equally reasonable and probable disposition of the testator's estate, I should have held that an intestacy must result, for I would have no power to choose between alternatives in such a case.

I will declare that the construction of the will is as I have indicated.

Declaration accordingly.

Solicitors: *A. & G. Tooth; Hopwood & Co.*

K. R. A. H.

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[2] [1944] K.B. 484, 489; 60 T.L.R. 349, 350; [1944] 1 All E.R. 618, 620.

[3] [1948] Ch. 49.

[4] [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22.

[5] [1957] 1 W.L.R. 884; [1957] 2 All E.R. 467.

CHURCHER AND ANOTHER *v.* STREET AND ANOTHER.

1958
Dec. 2, 3, 4.

Roxburgh J.

[1956 C. 2869.]

Husband and Wife—Property—Matrimonial home—Desertion by husband—Occupation of home by wife—Sale of home by husband to mistress—Mortgage by mistress to trustees with knowledge of circumstances—Mortgage interest unpaid—Claim for possession—Rights of innocent beneficiaries of mortgagees—Exercise of court's discretion to grant possession—Circumstances under which exercisable—Applicable terms of exercise.

In 1942 a husband deserted his wife, the second defendant, leaving her in the matrimonial home, and went to live with his mistress, the first defendant. The house was owned by the husband and was subject to a building society mortgage. The husband wished to sell the matrimonial home, and in 1950 he bought another house for the wife to live in; she, however, refused to move at the last moment. The purchase money for this other house was trust money, borrowed from trustees who were the predecessors in title of the plaintiffs. At the same time further money was borrowed to cover the cost of repairs to the other house and to repay the mortgage on the matrimonial home. As security for these loans the husband executed a legal charge on the matrimonial home and the other house in favour of the trustees.

In 1951, following the decision in *Thompson* v. *Earthy* [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235, an arrangement was come to with the approval of counsel whereby the husband conveyed the matrimonial home to the mistress, who, it was thought, could take the property free of the wife's rights. To effect this arrangement the mistress borrowed part of the purchase money from the trustees and this money was then used to discharge the previous legal charge executed by the husband. The mistress then executed a new legal charge on the matrimonial home in favour of the trustees, the husband joining as surety and charging the other house as collateral security. The remainder of the purchase money was advanced by the husband to the mistress and secured by a second charge on the matrimonial home. In 1952 the mistress commenced proceedings against the wife for possession of the matrimonial home. This action was dismissed (*Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532). One of the trustees was a partner in the firm of solicitors acting for the husband and the mistress. The wife was of limited means, her total weekly income amounting to £2 12s. 6d., including £2 paid by her husband under a maintenance order; the mortgage interest was in arrear since 1954, and the matrimonial home was falling into disrepair; the

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[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

plaintiffs, as the present trustees, desiring to realise their security, sought possession of the house:—

Held, (1) that the discretion of the court to grant possession in such a case was unlimited, but was to be exercised judicially after taking into account all the relevant circumstances.

(2) That having regard to the conduct of the parties and especially to the fact that the wife was living in the house at the expense of the trustees' beneficiaries, who were entirely innocent, an order for possession at the end of six months would be made, with liberty to the wife to apply to the court if she paid the mortgage interest and arrears, kept the property in repair, and executed a deed of covenant with the mortgagees to that effect.

Observations of Denning L.J. in *Jess B. Woodcock & Sons Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152, 156–157; [1955] 1 All E.R. 445 applied.

ADJOURNED SUMMONS.

The plaintiffs, Russell Emanuel Churcher and Kenneth Grainger Streeter, were the trustees of the will of the late William Emanuel Churcher and were seeking possession of the freehold premises known as 58, St. Michael's Grove, Fareham. This house had been purchased in 1937 by Peter Denham (hereinafter referred to as "the husband") on a building society mortgage, and it became the matrimonial home of himself and his wife, Elizabeth Denham, the second defendant. In 1943 the husband was found to have deserted his wife, and he was living with the first defendant, Mrs. Dorothy Street, who was his mistress. At the date of the present hearing the wife was in receipt of the weekly income of £2 12s. 6d., of which £2 was paid by the husband under a maintenance order.

In 1949 the husband began to look for alternative accommodation for his wife as he wished to sell the house with vacant possession. In September, 1950, he found a leasehold house, 39, Henrietta Street, Portsmouth, and his wife agreed to move in if certain alterations were made. Relying upon this the husband contracted to purchase the house for £470. The lease was subject to a declaratory order under the town and country planning legislation, and the wife was informed of this. The husband did some of the alterations at a cost to himself of £103, but he was unable to do the structural repairs until after completion. On the morning of the day fixed for her to move in, October 25, 1950, the wife consulted her solicitors and refused to move in. The husband was bound to complete the purchase and the house was conveyed to him on December 22, 1950. The wife still refused to give up possession of 58, St. Michael's Grove.

The money for the purchase of 39, Henrietta Street and the alterations was obtained by an advance from the then trustees of the will of W. E. Churcher. Part of the sum was used to pay off the balance owing on the building society mortgage on 58, St. Michael's Grove. The loan was secured by a legal charge on both properties made between the husband and the trustees and dated December 22, 1950. One of the trustees at that time was a solicitor who was in partnership with the first plaintiff, R. E. Churcher, and the partnership acted as solicitors for the husband and his mistress. That trustee, therefore, knew, when the charge was taken, that the husband was in desertion and that the wife was in occupation of the matrimonial home. This took place before the decision of the Court of Appeal in *Bendall* v. *McWhirter*[1] and the trustees thought that they would have no difficulty in obtaining possession if default were made under the mortgage deed.

The husband continued to try to persuade the wife to go and live at 39, Henrietta Street, but as she refused to go, he and his mistress went there to live and remained until 1954, when he bought another house. From 1950 the wife lived alone in the matrimonial home, which had three bedrooms, and she never earned any money.

In 1951, following the decision of Roxburgh J. in *Thompson* v. *Earthy*,[2] an arrangement was come to with the approbation of counsel, under which the husband conveyed 58, St. Michael's Grove to his mistress for £1,500. £950 of this was raised by the mistress by an advance from the same trustees and the charge of December 22, 1950, was paid off. The advance of £950 was secured by a legal charge dated January 14, 1952, made between the mistress, the husband and the trustees, whereby the mistress charged 58, St. Michael's Grove by way of legal mortgage with the payment of the principal sum with interest, and the husband joined as surety and charged 39, Henrietta Street as collateral security. It was under this charge that possession of 58, St. Michael's Grove was sought. The whole of the advance of £950 was made by the trustees out of moneys subject to the trusts of W. E. Churcher's will. £550, the balance of the purchase money, was raised by a loan from the husband secured by a legal charge dated January 15, 1952, and made between the mistress and the husband whereby the mistress charged 58, St. Michael's Grove by way of legal mortgage, subject to the charge of

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[1] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[2] [1951] 2 K.B. 596.

January 14, 1952, with the payment to the husband of £550 with interest. By concurring in the arrangement the trustees obtained the covenant of the mistress. His Lordship found that there was nothing sinister in the scheme so far as the trustees were concerned; they were acting for clients whose interests, although not conflicting, were not identical. On April 1, 1952, the mistress commenced proceedings against the wife in the Queen's Bench Division (*Street* v. *Denham* [3]) claiming possession of 58, St. Michael's Grove. The action, which was defended, was tried by Lynskey J., who dismissed it.

In April, 1954, the husband sold 39, Henrietta Street for £500 and reduced the mortgage debt under the charge of January 14, 1952, from £950 to £750, its present amount.

The original solicitor trustee died on December 10, 1954, and was succeeded as trustee by the first plaintiff. The second plaintiff, Streeter, had become a trustee in April, 1952, on the death of a previous trustee. The mortgage interest was in arrear from March, 1954. In the last few years the wife had spent £11 in repairs to 58, St. Michael's Grove and the house was falling into disrepair. Neither the husband nor the mistress was of any financial standing. The trustees therefore asked the court for an order of possession under Order 55, r. 5A.

J. A. Plowman Q.C. and *D. Gidley Scott* for the plaintiffs. The law applicable is not in dispute—a deserted wife has, in this court, a right vis-à-vis her husband to remain in the matrimonial home. This right prevails not only against her husband but also against persons claiming through him, either as volunteers or purchasers for value, including mortgagees, with notice that the wife is in occupation and that she has been deserted. The wife's right, whether against the husband or his successors, is not a perennial tenancy, but a right to stay on only until the court in its discretion orders her to go: *Bendall* v. *McWhirter* [4]; *Jess B. Woodcock & Sons Ltd.* v. *Hobbs*.[5] The court in the exercise of its discretion in this case should order the wife to leave for the following reasons: the husband has not behaved unreasonably in that he has provided alternative accommodation: *per* Upjohn J. in *Westminster Bank Ltd.* v. *Lee* [6]; the wife has had a long time in which to find alternative accommodation and she has acted unreasonably in refusing the accommodation offered by the husband and in failing to find any herself; further, she has lived in the house free of charge and has done nothing in discharge of the mortgagor's obligations. With regard to the mortgagees' position vis-à-vis the wife, they are receiving no income and the property is deteriorating.

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[3] [1954] 1 W.L.R. 624.

[4] [1952] 2 Q.B. 466.

[5] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

[6] [1956] Ch. 7, 18; [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

The first defendant did not appear and was not represented.

Lionel Edwards Q.C. and *I. N. Duncan Wallace* for the second defendant. That the court has a discretion in a case such as this to evict the wife appears from the judgment of Denning L.J. in *Bendall* v. *McWhirter*.[7] This, however, is not a fit case for the exercise of the court's discretion. In *Bendall* v. *McWhirter*[7] Denning L.J. was not setting out to tabulate all the matters to be considered by the court, but was dealing with general principles, and he gave as one instance[8] that the court would not evict a wife where a husband had transferred the matrimonial home into the name of his mistress. When he said that, "Equity demands "that the successor in title should be in no better position than "the husband," he was referring to the case of a guilty husband. To evict this wife would, in the words of Denning L.J.,[8] amount to "such a cynical disregard of the married state" which "no "civilised community could tolerate." The mortgagees had full knowledge of the facts and were a party to the arrangement; therefore, they should not be in any better position than the husband. The discretion should only be exercised (1) where nothing disgraceful was done to evict the wife, or (2) where an assignee of the husband had only notice and not full knowledge of the facts. [Reference was also made to *Stewart* v. *Stewart*[9] and *Hutchinson* v. *Hutchinson*.[10]]

Facts relevant to the exercise of the discretion were that the plaintiffs had full knowledge of the husband's desertion, and stood to gain, since vacant possession would improve their security; the wife was never asked to pay the mortgage interest, and the trustees made no serious attempt to get the husband and the mistress to pay it.

ROXBURGH J. stated the facts and continued: Counsel for the plaintiffs conceded that in this court, and in this court only, the deserted wife has in respect of the matrimonial home an equity which is valid against a purchaser for value of the matrimonial home who has knowledge that she is a deserted wife, and also that the wife was such a person, and that the plaintiffs had that knowledge. That being so, it is agreed that the question whether the plaintiffs get possession depends upon the exercise by me of a judicial discretion, and the only matter of law which I have to deal with is whether there are any ambits to that judicial discretion, and, if so, what they are.

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[7] [1952] 2 Q.B. 466.

[8] Ibid. 484.

[9] [1948] 1 K.B. 507; [1947] 2 All E.R. 813.

[10] (1947) 63 T.L.R. 645; [1947] 2 All E.R. 792.

The last word on that subject so far has been said in *Jess B. Woodcock & Sons Ltd.* v. *Hobbs*,[1] in the Court of Appeal (Denning, Birkett and Parker L.JJ.), where the facts were as follows: A deserted wife remained in the matrimonial home, her husband paying the rent. The house was situated at the entrance to a yard where the husband carried on a road haulage business. Later the husband bought the premises and still permitted the wife to remain in occupation. When the road haulage industry was nationalised and the British Transport Commission compulsorily acquired the husband's business, he, through his solicitors, informed the commission that the wife was acting as a caretaker of the business and as such was living in the house rent-free. His purpose was to avoid paying the rent. When, some four years later, on the denationalisation of the industry, the commission sold what had been the husband's business to the plaintiffs, it passed on the same information to the purchasers as to the position of the wife. She was in fact not acting as caretaker, having no duties to perform. Shortly after the conveyance had been completed the plaintiffs gave the wife notice to quit, and when she claimed to remain as a deserted wife they brought proceedings for possession. It was held first (by Denning and Birkett L.JJ.), that the plaintiffs were bona fide purchasers of the premises for value but with notice that the wife was in occupation and, in the circumstances, with constructive notice of her equity to remain in occupation, and, accordingly, the plaintiffs' purchase was subject to the wife's equity to remain in occupation; but secondly (by the whole court) the wife's equity was a right to continue in occupation for so long only as the court in its discretion thought to be reasonable and, in the circumstances, she would be ordered to give up possession at the expiration of three months.

It is to be observed that in that case the plaintiffs had constructive notice only and not knowledge. I think it is fair to say

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[1] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

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Roxburgh J.

that that was itself one of the circumstances which was taken into consideration, but I do not understand it to be suggested that because the plaintiffs here had knowledge and not merely constructive notice they are not entitled to invoke the theory that it is for the court to exercise its discretion. I do not deny that it was one of the factors which was taken into consideration in that case.

Having considered the facts, Denning L.J. said[2]: "The "deserted wife has no right to stay indefinitely in the house. Her "right is only to stay until such time as the court in its discretion orders her to go out. That is the only right she has "against her husband, and it is the only right she has against his "successors. The court always has a discretion in the matter." The Lord Justice proceeded a little lower down[3]: "When the "purchaser, as here, brings an action for possession and the wife "sets up a claim to stay as a deserted wife, the court can, if it "thinks fit, make an order for her to go. The exercise of this "discretion is no doubt an anxious task, but a similar discretion "is exercised in the case of statutory tenants under the Rent "Acts, and in applications under the Bankruptcy Act, 1914 "(*Bendall* v. *McWhirter*[4]), and under the Law of Property Act, "1925 (*Bull* v. *Bull*[5])." He then gave some illustrations, but I do not read those as being definitions of any test which is to be applied, but merely as illustrations of what the court might be expected to do if the circumstances corresponded with the illustrations given, and the circumstances in this case do not, in my view, correspond with any of the illustrations given. But I notice some of the things which the Lord Justice took into consideration, and I will read them[6]: "The purchasers bought in "good faith at a fair value and they did not know she was a "deserted wife. They were told she was a caretaker. She had "been many years in the house paying no rent. When she was "offered a tenancy at 21s. 2d. a week she did not accept it. If "she had only accepted it, she could have been a statutory tenant "with a status of irremovability, . . . but she has not at any time "offered to pay any rent. She sought in these proceedings to set "up the Statute of Limitations and claim a squatter's title. "True it is that she left everything to her husband. She "thought it was his duty to provide a roof over her head. It was

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[2] [1955] 1 W.L.R. 152, 156.

[3] Ibid. 157.

[4] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[5] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

[6] [1955] 1 W.L.R. 152, 157.

"he who set up the story of a caretaker so as to save himself "paying rent. But, innocent as she is, she cannot be left there "much longer without paying rent. I think we should make an "order for her to give up possession in three months. That will "give her time to apply to the courts for further maintenance "from her husband to make up for the loss of her home."

Birkett L.J. said that he was of the same opinion. He said [7]: "I agree with what my Lord has said, that it is open to this "court to deal with this matter of discretion and it does deal "with it today. I do not suppose that all the facts of this case "will ever be fully ascertained, . . . I think that enough is known "for this court to exercise its discretion. It is plain that the "deserted wife cannot claim to have a perennial tenancy whereby "she can stay there and never be removed in any circumstances."

Parker L.J. took a somewhat different view. He said [8]: "I agree with the proposed order. I would only add this. At "one time it looked as if we should have to decide, there being "no decision of this court as yet on the matter, whether the "protection afforded to a deserted wife in *Bendall* v. *McWhirter* [9] "could be extended to a case where the property in which the "wife continued to reside had been purchased by a purchaser "for value with constructive notice of the wife's possession. "Speaking for myself, I should on that matter have required "considerable further argument, since, as at present advised, "I see great difficulty in extending the wife's protection so as to "give her any rights against a bona fide purchaser, whether "with or without notice."

I want next to deal with the part played by the plaintiffs' predecessors in title, the trustees of the will in 1952, because that has been the subject of acute attack by Mr. Edwards, not without some support from authority, and I must deal with it fully.

If, when I decided *Thompson* v. *Earthy*,[10] I had thought of the possibility of some such transaction as was carried out in this case as between the husband and the deserted wife, I should have given further reflection to the case, and I can well understand that if the courts had not intervened to prevent those kinds of transactions, Parliament would have intervened. It would have been an advantage, in my view, if Parliament, rather than a higher court, had intervened, because, in order to prevent certain cases of injustice to deserted wives, a position has been brought about which may produce considerable injustice to other people unless each case is brought before the courts, which is a course involving considerable expenditure. That is very relevant, because, in explaining why he took the view that a wife's equity, as it is now commonly called, to the matrimonial home affected a purchaser for value, Denning L.J. said in *Bendall* v. *McWhirter*[11]: "It has been suggested that the husband's right "to apply under section 17 [of the Married Women's Property "Act, 1882] for possession is personal to the husband and does "not extend to his successor. Hence it is said that the successor "must be able to sue at law for possession because it is inconceivable that he should have no means of getting her out. "That was the argument which prevailed with Roxburgh J. in "*Thompson* v. *Earthy*[12] and with the county court judge in the "present case. It seems to me, however, that one answer to "it may be this: Although an application under section 17 has "to be made in the husband's name, nevertheless a successor in "title can compel the husband to allow his name to be used "for the purpose. If the husband sells the house, there is an "implied assignment by the husband of his right to obtain possession; and equity has always compelled an assignor to allow an "action to be brought in his name. So, if the husband becomes "bankrupt, the trustee can compel the husband to allow his "name to be used for an application under section 17: see "sections 22 (3) and 38 (*b*) of the Bankruptcy Act, 1914. Alternatively, the trustee in bankruptcy can make an application "under section 105 [of the Bankruptcy Act, 1914] for an order "that the wife do give up possession. In either case the court "which deals with the application is enabled under the relevant "section to do whatever is just. I must say, however, that "even if a successor cannot compel the husband to apply under "section 17, but has himself to bring an action at law, nevertheless I should have thought the court would have a discretion "whether to order possession or not, for that is the only way in "which effect can be given to the wife's right as now established."

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[7] [1955] 1 W.L.R. 152, 159.

[8] Ibid.

[9] [1952] 2 Q.B. 466.

[10] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.

That last sentence is a critical one. It is obvious that the discretion under section 17 of the Married Women's Property Act, 1882, is not one of which, for example, the plaintiffs in the present case could have availed themselves. The discretion conferred by that Act is a statutory discretion. This discretion that I am now exercising appears to have had its birth in that sentence: "I should have thought the court would have a discretion whether to order possession or not, for that is the only "way in which effect can be given to the wife's right as now "established." Then it goes on [13]: "Any other view would lead "to great injustice." I think, therefore, it is a discretion which the court, or at least which Denning L.J. found, to spring ex necessitate rei, and in justification for it he added these very material words: "Any other view would lead to great injustice. "It would mean that a guilty husband could transfer the house "into the name of his new mistress and then get her to evict "his innocent lawful wife from the matrimonial home. No "civilised community could tolerate such a cynical disregard of "the married state. Equity demands that the successor in title "should be in no better position than the husband." "Well," says Mr. Edwards with great force, "what about this case: is "not this just such a case as the one of which Denning L.J. "has said, 'No civilised community could tolerate'?." "Such "a cynical disregard of the married state" is what he is talking about, and we are not in this case concerned with the married state at all, but with the question whether or not somebody has lent some money, and whether he should or should not recover it by pre-existing rules of law. That is the first thing. Secondly, in this case, unlike the illustration which Denning L.J. gave, the husband did behave very reasonably in regard to his wife's accommodation before this transaction took place, and that is, I think, a factor of considerable importance. Thirdly, whatever may be thought about the transaction when regarded as one between the husband and his deserted wife—and I must confess that I think that in that regard the most offensive part of it was the selling to the mistress, rather than to any other person—the trustees, who lent money because they were trustees, have not acted wrongly. They only gave the transaction their support to the extent of permitting what they thought was a good mortgage to be changed into what they thought was an equally good mortgage, neither better nor worse, for I disregard the mistress's covenant. They did it with the knowledge that the transaction had been submitted to counsel with a query as to its propriety, and counsel had expressed himself as satisfied. They stood in no circumstances to gain anything out of it except, to my mind, the unimportant benefit of the additional security of the mistress's covenant. Could any court on those materials find the trustees guilty of a breach of trust?

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[11] [1952] 2 Q.B. 466, 483.

[12] [1951] 2 K.B. 596.

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[13] [1952] 2 Q.B. 466, 484.

The trustees acted in part on the advice of the trust solicitors, but more important, as that was the firm of which one of the trustees was a member, they acted here on the approbation of counsel. I think it was a little strong to say it was on the advice of counsel, but counsel certainly advised them that it was a safe thing to do. I cannot visualise that the trustees would be held to have committed a breach of trust in those circumstances, and, if not, who is going to suffer from this transaction? The solicitors who devised the scheme subject to counsel's approval should not suffer, but the beneficiaries of this trust, who had nothing whatever to do with either the matrimonial dispute or this transaction except their concurrence in what their trustees did in the manner which I have indicated, have suffered. Moreover, I think that Denning L.J. spoke perhaps more strongly than he intended in that passage in *Bendall* v. *McWhirter*,[14] because, while I do not suggest that the underlying reasoning is unsound, namely, that Parliament would almost certainly have intervened, if the courts had not done so, to prevent such a transaction as the Lord Justice was visualising, I have always thought that it was not unprofessional to take such advantage of loopholes in the law as existed from time to time. I find it very difficult to condemn any solicitor who, thinking he saw a way out of what was, I think, an unjust situation, namely, that the wife was staying in this house and refusing to accept alternative accommodation and paying nothing for it, took this way out of it. It does not seem to me that it was an improper thing for him to advise his client to try and get out of it in that way. We know the attempt failed, but the whole state of the law on this subject is not clear yet. It was very obscure then, and I think the fairer approach to this transaction is to be found in a passage in Denning L.J.'s judgment in the *Woodcock & Sons Ltd.* case, where, after referring to *Street* v. *Denham*,[15] *Ferris* v. *Weaven*[16] and an unreported case on the same subject, he said[17]: "Counsel for the "plaintiff company said that those three cases were to be "explained as cases of collusion; but they were not put on that "ground, and I do not think it is the correct explanation. The "conveyances were real enough. They were not shams. They "were intended, it is true, as a means of getting round the law;

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[14] [1952] 2 Q.B. 466, 484.

[15] [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

[16] [1952] 2 All E.R. 233.

[17] [1955] 1 W.L.R. 152, 155.

"but that is not itself a ground for denying their validity. I "may instance the transaction by which hire-purchase finance "companies do business. All those transactions are a means of "getting round the law about bills of sale; but so long as there "is a real purchase by the finance company and a real hiring "back, the transactions are good. The true explanation of the "three cases is, I think, the ground taken by the judges, namely, "that the mistress and the purchasers respectively took with full "knowledge of the facts. They were therefore in no better "position than the husband and took subject to the wife's right "to stay in the house. The husband, it is true, had an ulterior "motive. He wanted the wife turned out of the house, but that "does not affect the legal position. It would be the same if the "husband had given the house to his mistress or to his brother-"in-law"—and I stress that, because I think the brother-in-law is much less offensive than the mistress—"by a deed of gift. If "they took with full knowledge of the facts, they ought not to be "able to turn out the wife any more than the husband could. "This means, no doubt, that the wife's right is an equity." That is language much less severe and much less flavoured with a moral reproach than is the language of the passage on which Mr. Edwards relies, and I am much more inclined to Denning L.J.'s later statement. I think Parker L.J.'s judgment on that point should not be overlooked. Having said what I have already read, he continued [18]: "I do not, however, in any way suggest "that *Street* v. *Denham* [19] and *Ferris* v. *Weaven*,[20] to which my "Lord has referred, were wrongly decided, since they could in "any event be justified on their special facts. In both those "cases the purchases were not by purchasers treating at arms' "length, but they were purchases made at the instigation of the "husband and so as to enable him to get a benefit therefrom; "in other words, the transaction in each case was a device to "get the wife out for the husband's benefit."

Therefore, too much weight should not be attached in this case to the circumstances that the trustees did concur in a transaction which might have been done with less offence at the time, and which now, in the light of later developments, would not be attempted at all. But I have taken that into consideration and it will affect, to some degree, the way in which I propose to exercise my discretion.

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[18] [1955] 1 W.L.R. 152, 160.

[19] [1954] 1 W.L.R. 624.

[20] [1952] 2 All E.R. 233.

I do not think that there are any limitations upon this recently judge-made discretion, except the limitation which applies to all exercises of judicial discretion, that is to say, that it must be exercised judicially, or in the light of judicial common sense. If the discretion exists at all, it seems to me that all the relevant circumstances should be taken into consideration.

I come next to deal with the other side of the picture. First, whatever may be said about these various rights, whether they are equities or irremovabilities, or whatever else they might be, two facts in this case stand out. The first is that the trustees were in no way involved in the matrimonial dispute, and the law of marriage of this country has suffered no cynical disregard by them, or any disregard at all. The second fact is that, without any arrière-pensée, they lent £950 entirely as a matter of business, that is to say, as an investment as trustees, and they had no purpose of facilitating either the wife's or the husband's fortunes; they just wanted an investment for their money and the husband had the money; the mistress had no money, and if they have done anything amiss, it is merely that they have given up the better security for one not quite as good, because it would have been much better to have had the husband's security without the mistress's covenant than to have had her security and her covenant.

Why, because the husband deserted his wife 16 years ago, should the deserted wife be living in this house, not at the expense of the husband, but at the expense of the trustees' beneficiaries? In that connection I stressed a passage in Denning L.J.'s judgment: perhaps it would be fairer to see whether the husband's conduct could not be compensated for more equitably by an increase in maintenance than by depriving the beneficiaries of the income on the money which they have lent. If I did not grant any relief in this case, it seems to me certain that this wife, who has earned nothing in the last 16 years, does not appear to be working, and is extremely poor, would be able to live rent and interest free in this house for the rest of her days at the expense of the beneficiaries. That cannot possibly be right, on any view of this case. It is all very well to say: " Why do not the trustees sue the mistress? Why " do not they sue the husband? " I do not think it would be a very profitable transaction for the trustees, even if they got a judgment against the mistress, because it would probably never be satisfied. These trustees would never have advanced money if they had not thought they had a security in this property; they never lent this money on the security of the husband or the mistress; they lent it on the security of the property. It seems to me that something very strong would be needed to produce such an inequitable result as to deprive the beneficiaries of income because of this dispute between the husband and the wife, however right the wife may be in the matrimonial dispute. Where people who have lent money are concerned, a deserted wife must sooner or later try and mitigate the damage which she has suffered in the practical sphere. I cannot refuse the trustees relief.

On the other hand, I appreciate the great difficulties in which the wife may be. Housing accommodation is extremely difficult to get, and I cannot imagine that any local authority would look with much favour on a woman who was living in a house with three bedrooms, and who was not doing anything in the way of taking in lodgers. It seems to me possible for her to bring about a position in which she might continue to live in this house and the beneficiaries might have their 4 per cent. interest and their security preserved. That would postpone their chances of realisation, but that would not matter much so long as the security were kept up. It would also mean they could not get a greater rate of interest than 4 per cent., which no doubt they could if they called it in, but I think that disadvantage is the price that the plaintiffs should pay.

Therefore, what I propose to do is to make an order for possession six calendar months from today. My view is that if the wife wants to stay in this house after that date, she must make satisfactory proposals to the plaintiffs. I shall give an outline of what I should regard as satisfactory.

Although, strictly speaking, the wife cannot charge the premises because she has no title that is capable of being charged, she should execute a document which bears a close family resemblance to a mortgage, by which on no ground could she stay, except by consent, after divorce, or the death of the husband, or make an assignment to take effect after her death. I think it would not be fair to require her to covenant to repay the principal; but it would be fair to make her covenant to pay the interest and to keep the property in the same state of repair as is required by the subsisting mortgage deed. It may be that if that clause is not sufficiently stringent, a more stringent clause is warranted, having regard to the fact that the mortgage cannot be called in for merely not repaying the capital. That is a matter for investigation. I also think that she must pay the arrears of interest which have accrued during her period of occupation.

Judgment against the first defendant.
Order for possession against the second defendant at the end of six months, with liberty to apply to the court within five months.

Solicitors: *Sinclair, Roche & Temperley for Churcher & Churcher, Gosport; Gibson & Weldon for Hobson, Thomas, Sherwell & Wells, Portsmouth.*

In re WESTMINSTER'S DEED OF APPOINTMENT.
KERR AND OTHERS *v.* WESTMINSTER.

C. A.

1959
Jan. 27, 28.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1956 W. No. 1352.]

Revenue—Income tax—" Free of tax " payments—Provision made before September 3, 1939*—Covenant to pay annuity after death of husband in marriage settlement made before September* 3, 1939*—Death of husband in* 1953*—" Provision "—When " made "—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 486.

Statute—Construction—Mischief intended to remedy—Uncontemplated taxation—Income Tax Act, 1952, *s.* 486.

By deed of February 19, 1930, made in consideration of his marriage with the defendant, W., in exercise of the powers vested in him by a resettlement of 1901, irrevocably appointed by way of jointure to the defendant during her life a rentcharge of £6,000 to commence from his death to issue out of the settled hereditaments; and he further covenanted with the defendant that, if the then intended marriage was solemnised and if the defendant survived him, his executors and administrators would during her life pay to the defendant such yearly sum as with the jointure rentcharge would, after deduction of all income tax and surtax, leave the net yearly sum of £6,000. The marriage between W. and the defendant was solemnised the next day. W. died in 1953. Danckwerts J. held that section 486 of the Income Tax Act, 1952,[1] did not apply, and that the defendant was entitled to be paid £6,000 free of income tax and surtax:—

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[1] Income Tax Act, 1952, s. 486 (1): " Subject to the provisions of " this section, any provision, however " worded, for the payment, whether

Held, that the relevant "provision" was "made," for the purpose of section 486, before September 3, 1939—viz., on February 19, 1930. Accordingly the section applied.

Per Lord Evershed M.R. The presumed intention of the legislature was to remedy an injustice caused by the effect of war-time increases in taxation to heights undreamed of in pre-war philosophy. Since the covenantor (unlike a testator) had bound himself irrevocably, that injustice arose in the present case.

Per Romer L.J. "Provision" for the purposes of section 486 (1) (*b*) means the beneficial interest created, not the instrument or clause thereof creating it. The relevant date to consider is the date when the contingent right created was conferred and not when the annuity (if ever) became presently payable.

Berkeley v. *Berkeley* [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154 distinguished.

Decision of Danckwerts J. reversed.

APPEAL from Danckwerts J.

In exercise of the powers conferred on him by a resettlement of his estate dated February 15, 1901, the then Duke of Westminster by clause A of a deed dated February 19, 1930, in consideration of his then intended marriage with the defendant, Loelia Mary, Duchess of Westminster, irrevocably appointed by way of jointure to her a clear yearly rentcharge of £6,000 to commence from his death and to issue out of certain freehold hereditaments. By clause B of the deed he covenanted with the defendant and also with the trustees of the deed that, if the intended marriage should be solemnised within six months from the date thereof, and the defendant should survive the covenantor, then his executors or administrators would, during her life, pay to her such a yearly sum as together with the jointure rentcharge thereinbefore appointed and for the time being actually payable to her would, after deduction of all income tax and surtax, and any other taxes whatsoever for the time being payable in respect of the said yearly sum and jointure rentcharge or either of them, leave the net yearly amount of £6,000 free from all death duties

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"periodically or otherwise, of a stated "amount free of income tax, or free "of income tax other than surtax, "being a provision which—(*a*) is "contained in any deed or other "instrument, in any will or codicil, "in any order of any court, in any "local or personal Act, or in any "contract, whether oral or in writing; "and (*b*) was made before September "3, 1939; and (*c*) has not been varied "on or after that date, shall, as "respects payments falling to be "made during any year of assessment the standard rate of income "tax for which exceeds five shillings "and sixpence in the pound, have "effect as if for the stated amount "there were substituted an amount "equal to the appropriate fraction "thereof."

and deductions whatsoever, such yearly sum to commence from the death of the covenantor and to be payable quarterly on the usual quarter days and to belong to the defendant for her separate use without power of anticipation (except as in the deed specially provided) during any coverture. By the same clause the covenantor, in exercise of all relevant powers given to him by the resettlement, so far as he lawfully could, irrevocably charged the hereditaments with the payment of the sum thereinbefore covenanted to be paid.

The marriage of the covenantor and the defendant was solemnised on February 20, 1930. On September 3, 1939, war was declared with Germany. The marriage was dissolved on February 3, 1947. The covenantor died on July 19, 1953, and the charge contained in the deed of covenant of February 19, 1930, became effective.

By this summons the plaintiffs, the executors of the covenantor, asked whether, upon the true construction of the deed of 1930 and of section 486 of the Income Tax Act, 1952, that section was applicable to the sums payable by them as such executors to the defendant during her life under the covenant contained in clause B of the deed, and, if that question were answered in the affirmative, ancillary questions were asked.

Danckwerts J. held that section 486 was not applicable to the sums payable by the executors to the defendant under the covenant in the deed of 1930.

The plaintiffs appealed.

John Pennycuick Q.C. and *E. I. Goulding* for the plaintiffs. Danckwerts J. held that the decision of the House of Lords in *Berkeley* v. *Berkeley* [2] applied to the facts in this case and constrained him to hold that section 486 of the Income Tax Act, 1952 (formerly section 25 of the Finance Act, 1941), did not apply to the tax-free annuity which the late Duke of Westminster had covenanted, in contemplation of his marriage, by a deed of February 19, 1930, should be paid by his personal representatives to his widow, the defendant. The plaintiffs' contention is that *Berkeley* v. *Berkeley*,[2] on the contrary, supports the opposite conclusion. Once the covenantor had committed himself to the payment of a tax-free annuity, one would expect the provisions of the section to apply to a deferred annuity as well as to an annuity immediately payable. Danckwerts J. held that in section

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[2] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

486 " any provision " meant an interest in possession only. The plaintiffs contend that " provision made " includes an interest in expectancy which turns into an interest in possession. The *Berkeley* decision [2] was referred to in *Inland Revenue Commissioners* v. *Saunders.*[3] The real basis of the decision in the *Berkeley* case [4] is that a provision is " made " when the beneficial interest is created before September 3, 1939 (hereinafter called the " war date "). It does not matter whether the interest is in possession or reversion. The reasoning of their Lordships' speeches in the *Berkeley* case [4] shows that the section is appropriate to cover deferred interests created before the war date.

" Provision made " before the war date means that the interest was conferred before the war date. A legal right must have been created. Such a right is to be contrasted with a mere spes which is all that an annuitant had under a will executed before the war date where the testator died after it. A right to receive a deferred annuity arising under a covenant made before the war date was a legal right at that date. The *Berkeley* decision,[4] properly understood, leads to a conclusion opposite to that reached by Danckwerts J.

Charles Russell Q.C. and *Desmond Miller* for the defendant. It is first to be observed that it is not possible to draw any logical picture of the operation of section 486 and to say that an instrument made before the war date, which cannot be revoked, is within the section and one which can then be revoked is not within it. A covenant to pay a tax-free annuity made before the war date with a power of revocation is within the section. The mere fact that a covenantor cannot get out of his obligations does not of itself necessarily mean that the section applies. The *Berkeley* case [4] excludes the notion that the date of the instrument is the determining factor. It is necessary to see when the provision was " made." A will is not " made " until after the testator's death. Their Lordships have held that it is relevant to see not when the document was made but when the " provision " was made.

The plaintiffs' contention is that the distinction is only of importance in the case of wills: in the case of benefits conferred by deed the provision is made at the date of the deed. The defendant, on the other hand, says that in every case the question is: What is the date when the benefit was conferred? When the deed of 1930 is considered, it appears that the covenantor undertook that his personal representatives would pay out of his estate. The defendant could not assert any right under the deed of 1930 unless and until two conditions had been fulfilled, marriage and survival by her of the covenantor. Further, she had no disposable interest, since she was at all material times restrained from anticipating her interest. She had no right which she could sell. The answer to the question at what date was the right to a tax-free annuity conferred, is that no right was conferred on the defendant during the covenantor's life. Her interest was contingent both on her marriage to the covenantor taking place and on her surviving him. The section only applies when at the war date the annuity is presently payable. A benefit is provided when it becomes payable. This point was not considered by the House of Lords. A covenant not to revoke a provision to pay a tax-free annuity contained in a will executed before the war date of a testator who dies after it would not prevent the principle of the *Berkeley* case [4] applying. It is not possible to say that any provision was made for the defendant before the covenantor's death. He was under no obligation to pay anything. The only obligation was that of his personal representatives to pay after his death.

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[2] [1946] A.C. 555.

[3] [1958] A.C. 285; [1957] 3 W.L.R. 474; [1957] 3 All E.R. 43.

[4] [1946] A.C. 555.

John Pennycuick Q.C. in reply. With regard to the contention that this obligation was only conditional. The defendant's right to the annuity was contingent on her marriage to the covenantor. The marriage took place before the war date. Directly the marriage was celebrated the covenantor had bound himself unconditionally.

Nor is it correct to say that the defendant's right arose when the contingency of her surviving the covenantor happened. Her right then matured in possession. She had from the date of the execution of the covenant a right to a tax-free annuity. If the defendant is right, no covenant entered into before the war date is within the section if it is subject to any condition or contingency.

The defendant alleges that the plaintiffs' construction of the section would lead to anomalies. That may be so, but the anomalies would be greater if the defendant's construction were adopted. In exceptional cases it may be difficult to say on which side of the line a tax-free annuity falls. For example, where a testator, who dies after the war date, has covenanted not to revoke a legacy of a tax-free annuity in a will executed before the war date. The relevant date for the purposes of the section

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is that when a right to a tax-free annuity is conferred and not the date when it becomes presently payable.

LORD EVERSHED M.R. stated the facts and continued: The question raised by the summons and argued upon this appeal is a question of the effect upon the deed of February 19, 1930, of what is now section 486 of the Income Tax Act, 1952 (formerly section 25 of the Finance Act, 1941). [His Lordship read subsection (1) of section 486, and continued:] The definition of "appropriate fraction" is to be found in subsection (5). It is conceded that "the appropriate fraction" in this case (if the section is applicable) is 23/29ths. It is also conceded that, if the section is applicable, the "stated amount" referred to is not the sum total of the obligations under the deed of appointment but what may be called the "making up" figure contained in clause B.

At first sight, it would seem (with all respect) that the question is not a difficult one; for by the deed "provision" was "made" for the payment of a "stated amount" free of income tax, that provision being contained in a deed made before September 3, 1939 (which hereafter, for brevity, I will call "the war "date"), and not afterwards varied. But it has been argued in this court, and in the court below (and before Danckwerts J. the argument succeeded), that, upon more accurate use of language, it is not true to say, in the circumstances of this case, that provision for payment of the sum in question was made before the war date.

In the court below, the conclusion in favour of the defendant was largely influenced by *Berkeley* v. *Berkeley*,[1] which Danckwerts J. thought bound him to hold as he did. In this court, the argument for the defendant by Mr. Charles Russell has, I think, been put on a somewhat different ground. But it will be convenient for me to turn first to *Berkeley* v. *Berkeley*.[1] It was a case (stating the facts quite briefly) in which, as a result of a will made before the war date by a testator who died afterwards, certain provisions for payment of annual sums in favour of his wife were made; and the question was whether it could be said that the appointment in favour of his wife contained in the testator's will made—that is, executed—before the war date, though the testator survived that date, constituted a provision made before that date within the meaning of the section (then section 25 of the Act of 1941).

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[1] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

The House of Lords answered that question negatively. As I read the speeches of the noble Lords, the ground upon which they founded their conclusion was, briefly, this: that a will in no sense is effective until the testator's death: until that date the will is liable at any time to be wholly revoked: it is a mere expression of intention at the time that it is made. Though a man might, no doubt, say in ordinary conversation during his life that he had "made provision" for his wife by his will, that in truth is not an accurate use of words: they only mean, more strictly construed, that he has executed a will which, if unrevoked, will make provision for his wife on his death.

That view is also supported (as the noble Lords pointed out) by the presumed intention of the legislature—namely, to remedy an injustice caused by the effect of wartime increases in taxation to heights undreamed of in pre-war philosophy. There is, indeed, no doubt that the effect of the high rate of taxation is to impose a very great burden, or is liable to impose a very great burden, on estates which are under obligation to pay tax-free amounts of income. Nevertheless (as was pointed out in the House of Lords), one still living was always able, when new taxation was brought to his attention—and, as Lord Simonds observed, he would not be likely not to notice it—to alter his will; and, if he did not do so, he should be presumed to have intended the consequences. On the other hand, if the donor had already bound himself irrevocably, then there was no means whereby he himself could remedy the situation, except, of course, by obtaining, with the consent, if it could be obtained, of the beneficiary, a variation of his obligation—a situation contemplated, and dealt with expressly, by paragraph (*c*) in the first subsection of the Act.

I do not wish to take too much time by multiplicity of citations; but I would like to make some references first to the speech of Lord Simonds. He said this[2]: "The question is "whether for the purpose of this section provision is made by "will for an annual payment when the will is duly signed or when "by the death of the testator the will becomes operative. The "question here is not when the will was made but when provision was made, a distinction which escaped the notice of "the late MacKinnon L.J. and, as I think, led him into error in

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[2] [1946] A.C. 555, 580.

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"*In re Waring.*[3]" A little later he said[4]: "It would have "been easy for the draftsman to refer the date to the document "and combine the first and second conditions. He did not do so "and I think that one good reason for not doing so was that, if "he had, the section might have had just the meaning for which "the respondents contend. But there would have been this "odd result that, whereas in every other case than a provision by "will the section would have dealt with rights known to the law "which had accrued at the war date, in the excepted case of a "provision by will it would have purported to operate on an "ambulatory document which had no force or validity whatever "at the war date and could have none until the testator died. By "introducing the date in a separate condition and providing that "the provision in question must be made before a certain date, "he postulates of every provision, however made, a common "content, namely, that it has a legal effect before that date." I take one last citation from that speech[5]: "Until a testator is "dead, the beneficiaries under his will have no better provision "than have the next of kin from their still intestate ancestor. "In my view the section must be read as dealing not with a spes "successionis nor with an expectation which rests upon a document liable at any moment to be torn up and having no force in "the law, but with rights known to the law and enforceable by "one man against another."

Lord Uthwatt, after referring to the presumed legislative intention to which I have already made allusion, said this[6]: "One "further general observation may be made. Testamentary "instruments appear in subsection (1), in the middle of a list of "other instruments all of which were in effective operation on "September 3, 1939, and the section applies in the same way as "respects the effect of the 'provision' whatever be the character "of the instrument in which the 'provision' is contained. The "general layout of the section as well as the substance of the "matter suggests that the legislature was dealing with a closed "series of transactions, involving therefore only the testamentary "dispositions of testators who died before the war date."

Finally, I go back to the leading speech of Viscount Simon, on which I think Danckwerts J. perhaps most particularly relied, since he made a citation from it immediately before the statement of his conclusion. Viscount Simon said[7] (and this is the passage, or part of it, which Danckwerts J. cited): "There is a "clear distinction drawn in the section between a provision 'con-"'tained' in a document irrespective of date and a provision "'made' before September 3, 1939. Language is very ineptly "used if one speaks of 'making' a clause. It is not the instru-"ment, but the provision, for which a latest date is prescribed. "Moreover, all the other documents mentioned except a will or "codicil are such as would confer a vested right to the payment of "the annuity free of tax—a benefit which was created at a time "when income tax at 10s. in the pound was in no one's thoughts."

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[3] [1942] Ch. 426; 58 T.L.R. 367; [1942] 2 All E.R. 250.

[4] [1946] A.C. 555, 580.

[5] Ibid. 581.

[6] Ibid. 586.

[7] Ibid. 566.

I will refer to another passage because I shall pick it up later [8]: "The will of a living testator, on the other hand, confers no "right on anyone to any benefit therein mentioned. Even if it "existed side by side with a covenant not to revoke, the covenantee "has no rights under the will until the testator is dead."

It will be noticed from the passages I have read (and it may be taken that the same is applicable to the passages which I have not read) that there is in the speeches no expression of opinion at all on what the effect of the section would be in such a case as the present. It was pointed out by Mr. Russell that, if the matter was as simple as Mr. Pennycuick suggested, then one would perhaps have expected to find a statement of the simple contrast. But in truth it is, I think, clear that their Lordships adhered strictly, from beginning to end, to the particular—the sole—point which was before the House for its determination.

Danckwerts J. took it that the effect of the speeches was to lay it down—not only in the case of a will but in all cases—that a "provision made" meant, for the purposes of the section, a provision which had become effective in possession or enjoyment. As I indicated earlier, Mr. Russell did not go quite so far as that. His main argument was based on the contingencies in the relevant clauses of the appointment which I have read. I think Mr. Russell accepted the proposition that the word "payment" in subsection (1) must include payments in the future as well as present payments; and in any case I am satisfied that that must be so. But further, Mr. Russell—without, I think, conceding the point—was prepared to accept arguendo that the case might be otherwise if, for example, A covenanted, at a pre-war date, to pay to B x pounds per annum free of tax for ten years from some post-war date. But (as he said) that was not this case; and he contended (and with some truth) that this was not a matter where one could find some neat, logical pattern to cover all cases. All that Mr. Russell was concerned with in this case (as he pointed out) was this: that here the only effect that the deed could be said to have had on its execution before the war date was that there was a covenant or obligation, subject to two contingencies, to pay future annual sums; the two contingencies being, first, the contingency that the marriage take effect in six months, and, secondly, that the defendant survive the appointor. Mr. Russell did refer to a third contingency, as to availability of the subject-matter; but that I do not take further time about.

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[8] [1946] A.C. 555, 566.

I agree entirely so far with Mr. Russell that we are only concerned with this case. Thus, I express no view, on the one hand, what would be the effect of the case intimated by Lord Simon, to which he did not give an answer, so far as relevant to this case—namely, the case where a man had executed a will containing a provision such as you find here and at the same time executed a covenant not to revoke it. Equally, I express no view about what the effect of the section would be where there was an appointment, somewhat in the same form as that in the present deed, but where the deed contained an unqualified power of revocation at any time during the appointor's lifetime. I also express no view about what the situation would have been if the period of the marriage contingency had been extended to cover September 3, 1939, and the marriage had not in fact been solemnised on that date. The fact is, in the present case, that on September 3, 1939—on the war date—the marriage had been solemnised, and that on that date the covenantor had bound himself irrevocably, and charged his estates in support of his executors' obligations, to the defendant to pay her a stated amount if she survived him—that is, from the date of his own death—for the rest of her life.

Applying the ordinary tests of language—according, that is, to its ordinary common-sense usage, which is, I apprehend, appropriate to an Act of Parliament, in the absence of something special—I think that a " provision " had been " made " before September 3, 1939, for payment of a " stated amount."

I accept the test which Mr. Pennycuick put in the course of his reply: The defendant is now in receipt of certain annual sums: and if the question be asked, by virtue of what right is she being paid? the answer is, surely: the right which was created by the execution of the appointment before the war date.

It will be noticed that the other view would at any rate lead to very extraordinary anomalies. I take, as an example, the distinction (if Mr. Russell's argument is right and if the concession that he made in argument be made) between these two cases—between, first, a right to receive x pounds contingent on the recipient attaining twenty-one or surviving a particular date; and, secondly, an absolute right to receive, from some future date, whether the beneficiary survives or not, a stated amount, or to receive such a stated amount subject to some prior interest. If the test is applied which was applied in *Berkeley* v. *Berkeley* [9]—that of considering the purpose of the legislation—it is plain that there can be no distinction whatever between the two cases which I have suggested: in both cases an obligation has been entered into which would result in a liability which, regarded from this standpoint, could not have been intended, and from which there can be no escape—apart from voluntary variation or as a result of the legislation.

Similarly, Ormerod L.J., in the course of the argument, put the case of a will, not only made, but proved, before the war date, but containing a provision for some future tax-free payments. Once again it is plain that, if the evil which the legislature intended to remedy be looked at, that is a case where legislation is as much required as it would be in the straightforward case of an obligation, which had become effective in possession by the war date, to pay a stated sum in a certain event.

I should add that reference was made in the course of the argument to *Inland Revenue Commissioners* v. *Saunders*.[10] There was in that case some reference to *Berkeley* v. *Berkeley* [11]; but in my judgment the references do not carry the matter any further.

I, therefore, for my part conclude, first, that there was nothing in the reasoning or the speeches in *Berkeley* v. *Berkeley* [11] which binds this court to hold in favour of the defendant; and, secondly, that, the matter being treated, therefore, as res integra, the case falls clearly (as I think) within the terms of the section, construed according to the ordinary standards of language.

I would therefore, for those reasons, allow the appeal.

ROMER L.J. I agree.

In *Berkeley* v. *Berkeley* [11] the House of Lords held (in effect) that "provision," in relation to section 486 (1) (b) of the Act of 1952, means the beneficial interest created by an instrument and not the instrument itself or a clause thereof. That being so, it appears to me that in the present case two questions arise: (1) what beneficial interest, if any, was created in the defendant's favour by the deed of 1930? and (2) was such interest one within the scope of the section?

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[9] [1946] A.C. 555.

[10] [1958] A.C. 285; [1957] 3 W.L.R. 474; [1957] 3 All E.R. 43.

[11] [1946] A.C. 555.

Now as to the first question, the interest which had been created by the covenant in favour of the defendant was the right, on a future contingency, to receive a tax-free annuity out of the covenantor's estate. There is no doubt but that, at the relevant date, namely, September 3, 1939, there was an irrevocable future obligation on the covenantor's legal personal representatives to pay the annuity out of the assets of the estate if the contingency occurred, namely, if the covenantor died leaving the defendant surviving; and a corresponding right was vested in the defendant to receive it. There was no power reserved by the covenantor under which the defendant could be deprived of the right to receive the annuity if she survived her husband, and no power to release the covenantor's estate from the liability to pay it. It follows, therefore, that a beneficial interest was conferred on the defendant by the deed.

The second question that arises is whether that interest is one to which the modifying provisions of the section apply. If the section were confined to a right created before the relevant date to receive immediate payment of a tax-free annuity, then the defendant's contingent right to her future annuity would remain unaffected. In other words, a question posed by Mr. Russell during the course of the argument would require a negative answer. That question was (as Mr. Russell put it): in this case, had there been provided before September 3, 1939, a tax-free annuity for the defendant? Mr. Russell said the answer must be "No," and that only the covenantor's legal personal representatives were or might become under an obligation to provide it. It seems to me that that was a somewhat formidable way of putting Mr. Russell's case; but I think the true answer to it is this: that the section is not, in its terms, confined to annuities immediately payable, and I can see no warrant for reading in a qualification which would in great measure whittle down—and for no intelligible reason—the effect of the section. Nor can I see anything in the speeches in *Berkeley* v. *Berkeley*[11] to suggest that the section is only concerned with annuities immediately payable, so that it excludes annuities payable upon future contingencies.

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[11] [1946] A.C. 555.

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On the contrary, all their Lordships seem to have recognised that a right to a tax-free annuity, whether at law or in equity, which had been created before September 3, 1939, was within the section, so long as it really was a right; and none of them suggested that the annuity must be presently payable.

On September 3, 1939, the defendant's position was that the interest which she then had under the deed was a contingent legal right to a future annuity which would ripen into a right to present payment if she survived her husband; and I agree with Mr. Pennycuick that the relevant date to consider is the date when this contingent right to receive the annuity was conferred and not the date when the annuity should become presently payable, if it became payable at all.

In conclusion, I would say that it is quite clear to me that the judge himself would have given effect to this view had he not thought himself precluded from so doing by the speeches in *Berkeley* v. *Berkeley*.[11] For my part, I am satisfied that the speeches do not have that result; and I accordingly agree that this appeal must be allowed.

ORMEROD L.J. I agree; and although we are differing from the judge there is nothing that I wish to add to the reasons which have been given by my Lords.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *William Charles Crocker; Sydney Morse & Co.*

B. A. B.

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[11] [1946] A.C. 555.

MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

[1937 M. No. 257.]

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Nov. 5;
Dec. 18.

Jenkins,
Romer and
Willmer L.JJ.

Revenue—Estate duty—Property passing on death—Property chargeable —Derivative trust—Gift of income of trust fund to beneficiaries of "A" trust for 21 years subject to discretionary power of accumulation—Gift over to persons to be appointed under "B" trust—Rights

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of "A" beneficiaries relinquished by deed and court order in favour of "B" beneficiaries subject to similar power—Appointment of "B" beneficiary to interest in income of trust fund—Death of beneficiary before expiration of 21 years—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*).

A testator who died on July 20, 1937, by the codicil to his will dated June 19, 1935, bequeathed certain shares, called "the "retained shares," to his trustees upon trust that they should "until the expiration of a period of 21 years from my death or until "my daughter Jeannette W. shall die whichever shall first happen "apply the income of the retained shares" in making certain grants to certain shipping companies mentioned in his will, "and "at the expiration of such period or at the death of my said "daughter whichever shall first happen my trustees shall hold the "retained shares upon trust if my said daughter shall die before "the expiration of the said period of 21 years to accumulate the "income thereof until the expiration of the said period of 21 "years . . . and from and after the expiration of such period of "21 years my trustees shall hold two fifths of the income of the "retained shares and such accumulations aforesaid if any upon "protective trusts as declared by section 33 of the Trustee Act, 1925, "for the benefit of Anne H. wife of my nephew Francis H. for the "period of her life Subject thereto my trustees shall during the "lives of my said nephew and his said wife and the survivor of "them apply the residue of the income of the retained shares and "such accumulations as aforesaid if any for the benefit of such "child or children of my nephew and his said wife as shall for the "time being be living and if more than one in such manner and in "such shares as during the life of my nephew and his said wife "[they] shall jointly and during the life of the survivor of [them] "the survivor of them shall in writing from time to time direct."

The testator further directed that from and after the death of the survivor of the nephew and wife the trustees should hold the retained shares and any accumulations in trust for such of their children or remoter issue as they or the survivor of them should appoint, with a trust in default of appointment for their children who should attain 21 or being daughters marry under that age.

The testator was survived by all the named persons. Jeannette W. survived the 21-year period, so that the trust for accumulation never took effect. Francis H. died in December, 1957; his wife and two daughters, who had attained 21, were still living. A son, Geoffrey H., whose death was the occasion of the present summons, died on October 7, 1955, having attained 21.

On October 25, 1941, pursuant to an agreement and an order of the court (which provided that on the existing equitable interests during the 21-year period being assured to the trustees they might be authorised to deal with the income arising during that period, whether or not Jeannette W. was alive, on the footing applicable after that period), a deed was made to vary the trusts of the codicil by the shipping companies, Jeannette W. (who was interested in certain events in income which might arise from the retained shares) and the testator's trustees. This provided that "each of "the shipping companies and Mrs. W. according to their respective "rights and interests hereby declare that as from the date of the "testator's death the income of the [retained shares] shall until "the expiration of the period of 21 years from the testator's death "or the death of Mrs. W. whichever shall first happen be held upon "the same trusts as are by the said codicil declared in respect of "the income of the said shares after the expiration of 21 years from "the death of the testator."

The nephew and his wife made the following directions in writing: (a) on February 22, 1954, directing payment of the three-fifths share of the income to their three children in equal shares; (b) on April 27, 1955, directing that the share of Geoffrey H. should be paid to a certain company for his benefit; (c) on April 9, 1956, after the death of Geoffrey, that the three-fifths share should be paid to the two daughters equally.

The Revenue claimed that the death of Geoffrey brought about a passing of a one-fifth share in the capital of the trust fund under section 1 of the Finance Act, 1894 [1] (as was held by Danckwerts J.), or that the deceased had an interest ceasing at his death on such proportion under section 2 (1) (*b*).

On appeal:—

Held, allowing the appeal, (1) that under the terms of the order of the court and the deed of 1941 there was no acceleration of Geoffrey's interest in the income of the retained shares due to take effect under the codicil after the 21-year period, as, in the event of the prior death of Jeannette W., the trustees still had a discretion to accumulate income, if they thought fit.

(2) That the interest of Geoffrey which passed on his death was derived not from the codicil but from the order of the court and the deed of 1941.

(3) That such interest, on which estate duty became payable under section 1 of the Act of 1894, was the principal value, actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares during the remainder of the 21-year period or until the death of Jeannette W., if earlier, together with the value (if any) attributable at the date of his death to a one-fifth share of any income which in the event of the death of Jeannette W. before the expiration of the 21-year period the trustees might think fit to distribute under the authority of the court order in lieu of accumulating it.

Attorney-General v. *Milne* [1914] A.C. 765 and *Christie* v. *The Lord Advocate* [1936] A.C. 569; [1936] 1 All E.R. 443 considered.

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[1] Finance Act, 1894, s. 1: "In "the case of every person dying after "the commencement of this Part of "this Act, there shall . . . be levied "and paid, upon the principal value ". . . of all property, real or per- "sonal, settled or not settled, which "passes on the death of such person "a duty, called 'estate duty' . . ."

S. 2: "(1) Property passing on "the death of the deceased shall be "deemed to include . . . (*b*) Property "in which the deceased or any other "person had an interest ceasing on "the death of the deceased, to the "extent to which a benefit accrues "or arises by the cesser of such "interest; . . ."

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APPEAL from Danckwerts J.

The facts are taken substantially from the judgment of Jenkins L.J.

This was an appeal by the present trustees of the will and codicil dated respectively June 4 and 19, 1935, of Charles Willis Harrison (hereinafter called " the testator "), who died on July 20, 1937, from an order of Danckwerts J. dated February 26, 1958, whereby it was declared that in the events which had happened estate duty became payable under section 1 of the Finance Act, 1894, on the death of Geoffrey Ainsworth Harrison (hereinafter called " the deceased ") in respect of a one equal fifth share of the capital of the " retained shares " referred to in the said codicil.

It is unnecessary to refer to any of the provisions of the testator's will. By the codicil thereto the testator (by clause 1) bequeathed to his trustees 10,000 of the ordinary shares held by him in Harrison Trust Ltd. and 10,000 of the ordinary shares held by him in the Atherton Investment Corporation Ltd. and directed that his trustees should hold such shares thereinafter called " the retained shares " upon the trusts thereinafter declared concerning the same.

By clause 2 of the codicil the testator declared the following trusts concerning the retained shares: " My trustees shall until " the expiration of a period of twenty one years from my death " or until my daughter Jeannette Adeline Wightman-Harrison " shall die whichever shall first happen apply the income of the " retained shares in making such grants to the shipping companies " mentioned in clause 5 of my said will or to any two or more " of them as for a period of twenty one years from my death my " trustees are directed to make under clause 6 of my said will and " upon the undertaking in that clause mentioned, and at the " expiration of such period or at the death of my said daughter " whichever shall first happen my trustees shall hold the retained " shares upon trust if my said daughter shall die before the " expiration of the said period of twenty one years to accumulate " the income thereof until the expiration of the said period by " investing the same and the resulting income from such invest- " ments in any mode of investment authorised by my said will " and from and after the expiration of such period of twenty " one years my trustees shall hold two fifths of the income of " the retained shares and such accumulations aforesaid if any " upon protective trusts as declared by section 33 of the Trustee

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"Act, 1925, for the benefit of Anne Harrison wife of my nephew "Francis Joseph Harrison for the period of her life. Subject thereto my trustees shall during the lives of my said nephew Francis "Joseph Harrison and his said wife and the survivor of them "apply the residue of the income of the retained shares and such "accumulations as aforesaid if any for the benefit of such child "or children of my said nephew and his said wife as shall for "the time being be living and if more than one in such manner "and in such shares as during the life of my said nephew and "his said wife my said nephew and his said wife shall jointly "and during the life of the survivor of my said nephew and his "said wife the survivor of them shall in writing from time to "time direct."

By clause 3 of the codicil the testator directed that from and after the death of the survivor of his said nephew and his said wife his trustees should hold the retained shares and such accumulations if any in trust (to put it shortly) for the children or remoter issue of his said nephew and his said wife as they or the survivor of them should appoint with a trust in default of appointment for their children who should attain the age of 21 years or being daughters marry under that age.

The testator was survived by his daughter, Jeannette Adeline Wightman-Harrison (hereinafter called "the daughter"), by his nephew, Francis Joseph Harrison (hereinafter called "the "nephew"), and by the nephew's wife, Anne Harrison (hereinafter called "the nephew's wife"). The nephew died on December 11, 1957. The nephew's wife was still living. They had two daughters who were still living and had attained the age of 21 years and one son, namely, the deceased, Geoffrey Ainsworth Harrison, who attained the age of 21 years and died on October 7, 1955, and on whose death the present claim to estate duty arose. The period of 21 years from the death of the testator expired on July 19, 1958, in the lifetime of the daughter, so that the trust under clause 2 of the codicil for accumulation of the income of the retained shares in the event of her dying before the expiration of such period in fact never became operative.

It will be seen that if the matter had been left to depend upon the codicil alone, there could have been no question of any liability to estate duty on the death of the deceased in respect of any share or interest in the retained shares, as on that footing his only interests would have been an interest in expectancy in the income of the retained shares under the trusts limited to take effect after the expiration of the period of 21 years from the

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testator's death, which by reason of the death of the deceased would have failed or determined before it became an interest in possession (see Finance Act, 1894, section 5 (3)), and the possibility of an interest under the trusts in default of appointment contained in clause 3, which could only constitute property for estate duty purposes in the event of both his parents dying without fully appointing the fund.

But after the death of the testator an arrangement was carried out by means of the documents and order of the court, and the Commissioners of Inland Revenue claimed that what was then done had the effect either (a) of bringing about a passing on the death of the deceased under section 1 of the Finance Act, 1894, of a one-fifth share in the capital of the trust fund (the view which commended itself to Danckwerts J.); or alternatively (b) of conferring on the deceased an interest ceasing on his death in a like proportion of the trust fund under section 2 (1) (*b*), which having regard to section 7 (7) (*b*) would have the same result as the primary claim under section 1.

By an agreement dated July 15, 1940, the parties to which included, amongst others, the two companies named in clause 1 of the codicil, the four shipping companies named in clause 5 of the will, and the daughter, provision was made for the reconstruction of the two companies named in clause 1 of the codicil, which involved the exchange of the retained shares for shares in two new companies formed to take the place of the two companies named in clause 1 of the codicil: and it was a term of this agreement that a further agreement should be entered into.

By a further agreement, also dated July 15, 1940, and made between the four shipping companies of the one part and the daughter of the other part, it was agreed and declared as follows: "(1) Mrs. Wightman-Harrison and the shipping companies shall upon the reconstruction agreement becoming "absolute execute an instrument in the form of the draft instrument annexed hereto marked VIII or in such other form as may "be agreed between Mrs. Wightman-Harrison and the shipping "companies and approved by the Chancery Division of the High "Court of Justice. This agreement is conditional on: (a) An "order being obtained from the Chancery Division of the High "Court of Justice sanctioning the exchange provided for by the "reconstruction agreement as respects the ten thousand shares "in Harrison Trust Ltd. and the ten thousand shares in The "Atherton Investment Corporation Ltd. specifically bequeathed "by the codicil dated June 19, 1935, of Charles Willis Harrison "and (b) The reconstruction agreement becoming absolute and "(c) Unless Mrs. Wightman-Harrison and the shipping companies "otherwise agree an order being obtained from the Chancery "Division of the High Court of Justice providing in substance "that the income of the said shares and of the investments for "the time being representing the same accruing between the "date of the death of Mrs. Wightman-Harrison and the expiration of twenty one years from the date of the death of the "testator shall be held upon the trusts which are applicable "under the said codicil of the testator to the same income after "the expiration of the said twenty one years."

A deed in the terms of the draft annexed to the last mentioned agreement was in fact executed by the four shipping companies, the daughter and the trustees on October 25, 1941.

By an order made by Simonds J. on November 1, 1940 (*In re Harrison, decd.*, 1940 H. No. 2453), approval was given to the acceptance and retention by the trustees of the will and codicil of the shares to be taken in exchange for the retained shares under the reconstruction agreement, and it was ordered (inter alia): "That (subject to the interests of the plaintiff Jeannette Adeline "Wightman-Harrison and the defendants The Willis Steamship "Company Ltd. National Steamship Company Ltd. The Gowland Steamship Company Ltd. and J. & C. Harrison Ltd. in the "income to arise from the said shares settled by the codicil and "the investments for the time being representing the same during "the period of 21 years from the date of the testator's death being "assured to the trustees of the said will) the plaintiffs as such "trustees may be authorised to deal with all income so arising "during the said period whether or not the plaintiff Jeannette "Adeline Wightman-Harrison be living on the footing applicable "under the said codicil to income to arise after the expiration "of the said period."

By a deed dated October 25, 1941, and made between the four shipping companies of the first part, the daughter of the second part and the trustees of the third part and expressed to be supplemental to the will and codicil, it was agreed and declared (so far as material for the present purpose) as follows: "(1) "Each of the shipping companies and Mrs. Wightman-Harrison "according to their respective rights and interests hereby declare "that as from the date of the testator's death the income of the "ten thousand shares in Harrison Trust Ltd. and the ten thousand shares in The Atherton Investment Corporation Ltd. which "were bequeathed by the said codicil of the testator and the "investments for the time being representing the same shall "until the expiration of the period of twenty-one years from the "death of the testator or the death of Mrs. Wightman-Harrison "whichever shall first happen be held upon the same trusts as "are by the said codicil declared in respect of the income of the "said shares after the expiration of twenty-one years from the "death of the said testator."

It was not in dispute that the testator made no disposition of any income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter which might not be applied in making grants to the four shipping companies in accordance with clause 2 of the codicil, and accordingly that any such unapplied income would belong to the daughter as the only person interested in any property as to which he died intestate. Accordingly the daughter and the four shipping companies were between them entitled to the whole of the income arising during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter, and were thus able to make the disposition of such income effected by the deed of October 25, 1941.

The position from and after October 25, 1941, therefore was that by virtue of the deed of that date the respective interests of the four shipping companies under clause 2 of the codicil and of the daughter under any intestacy in the income to arise from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter was as from the death of the testator held by the trustees as to two-fifths thereof upon protective trusts for the benefit of the nephew's wife during her life and as to the remaining three-fifths thereof in trust during the lives of the nephew and the nephew's wife and the survivor of them to apply the same for the benefit of such child or children of the nephew and the nephew's wife as should for the time being be living, and if more than one in such shares as the nephew and the nephew's wife or the survivor of them should in writing from time to time direct. It should be added that the deed of October 25, 1941, did not and could not touch the trust for accumulation during the residue of the 21-year period imposed by clause 2 of the codicil in the event of the daughter dying during that period, and that while the order of Simonds J. authorised the trustees to deal with all income arising during the 21-year period whether the daughter should be living or not on the footing applicable under the codicil to income arising after the expiration of such period, so that they could, if they chose, ignore the trust for accumulation, it did not oblige them to do so.

By a direction in writing dated February 22, 1954, the nephew and the nephew's wife directed that the three-fifths share of income of the retained shares should be paid to their three children in equal shares. By a further direction in writing dated April 27, 1955, the nephew and the nephew's wife directed that the share of income hitherto paid to the deceased should be paid to Messrs. T. Turketine & Co. Ltd. to be utilised by them for the benefit of the deceased. By a further direction in writing dated April 9, 1956, given in consequence of the death of the deceased on October 7, 1955, the nephew and the nephew's wife directed that as from that date the three-fifths share of the income of the retained shares should be paid to their two daughters in equal shares.

The Commissioners of Inland Revenue claimed that inasmuch as the second of the above-mentioned directions was still in force at the time of the death of the deceased he was entitled in possession at the time of his death to one-fifth of the income of the retained shares and consequently that the corresponding proportion of the capital of the retained shares passed on his death under section 1, the fact that his interest in such income was liable to be terminated at any time by a further direction being immaterial, inasmuch as in the events which happened it was in fact terminated by his death.

Danckwerts J. held that in the events which had happened estate duty became payable under section 1 of the Act of 1894 on the death of the deceased in respect of a one equal fifth share of the capital of the retained shares settled by the codicil.

The trustees appealed.

John Pennycuick Q.C. and *K. J. T. Elphinstone* for the trustees.

E. Milner Holland Q.C. and *E. Blanshard Stamp* for the Crown.

The respective arguments of the parties are set out fully in the judgment of Jenkins L.J.

Cases referred to in argument but not cited in the judgments: *Wallace* v. *Attorney-General* [2]; *In re Flower's Settlement Trusts*.[3]

Cur. adv. vult.

December 18. JENKINS L.J., after stating the facts, continued: On the part of the trustees, Mr. Pennycuick argued, albeit somewhat faintly, that the deceased was merely one of the objects of a discretionary trust whose death merely put an end to his chance of participating in the income to some unpredictable extent through the exercise of the discretion in his favour and enhanced the respective chances of the two daughters of so participating by reducing the number of objects of the discretion. If the trust could properly be regarded as a discretionary trust it appears to me that Mr. Pennycuick's argument on this part of the case would be unanswerable. But I agree with the judge that this is not a discretionary trust in any relevant sense. The nephew and the nephew's wife no doubt had a discretion as to the directions to be given from time to time, but it appears to me that their power of giving directions was in the nature of power of appointment and that each direction given was in the nature of a revocable appointment under that power, conferring on each object of the direction (or in other words each appointee) a definite interest in the share of income assigned to him or her continuing until revoked by some subsequent direction or until the previous death of the appointee. Mr. Pennycuick did not dispute that if this view was right this branch of his argument could not be supported.

I therefore reject the contention that no estate duty at all became payable on the death of the deceased because he was merely an object of a discretionary trust.

It remains to consider the more difficult question in the case, which may be put in this way: Granted that *some* property passed on the death of the deceased within the meaning of section 1 of the Act, what was the property which then passed and upon which duty then became exigible?

To this question the Commissioners of Inland Revenue propound the short and simple answer that inasmuch as the deceased was at the time of his death in receipt beneficially of one-fifth of the income of the retained shares under the direction then in force, and on his death that share of income ceased to be payable to him and became applicable for the benefit of his two sisters in such shares and manner as the nephew and the nephew's wife or the survivor of them should from time to time direct, the share of capital required to produce that income passed, that is to say changed hands, on his death, with the result that duty became payable on one-fifth of the corpus of the retained shares, the nature of the dispositions by which this actual passing of one-fifth of the capital was brought about being immaterial. It is also argued on the commissioners' side that the combined effect of the deed of October 25, 1941, and of the order of Simonds J. was to accelerate the interests in income limited by the codicil to take effect after the expiration of 21 years from the death of the testator and that the deceased should accordingly be regarded as having been at the time of his death beneficially entitled in possession to one-fifth of the income of the retained shares under the trusts of the codicil as so accelerated. Consideration of this branch of the commissioners' argument may conveniently be deferred until a later stage in this judgment.

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[2] (1865) L.R. 1 Ch. 1.

[3] [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462.

On the other hand, it is urged on the part of the trustees that all that passed on the death of the deceased was the principal value, actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares for the period until the expiration of 21 years from the death of the testator or until the previous death of the daughter, to which there should, I think, be added the principal value (if any) attributable at the date of the death of the deceased of one-fifth of any income which in the event of the death of the daughter before the expiration of the 21-year period the trustees might think fit to distribute during the residue of that period under the authority conferred by the order of Simonds J. in lieu of accumulating it in accordance with the trusts of the codicil.

The principles relied on by the trustees in support of this submission, and their application to the present case, may be thus stated:

(1) Under section 1 of the Act duty is leviable "upon the "principal value ascertained as hereinafter provided of all "property . . . settled or not settled, which passes on the death" of every person dying after the commencement of Part I of the Act; and under section 22 (1) (*h*) of the Act "settled property" means property comprised in a settlement.

(2) In this case the claim is clearly concerned with a passing of settled property. In order to make good a claim to duty in

respect of the passing on a death of settled property it is necessary (a) to identify the settlement comprising the property which or part of which is alleged to have passed; (b) to identify the property comprised in that settlement; and (c) to show that under the trusts of that settlement that property, or some part thereof, passed on the death in question.

(3) The relevant settlement in the present case must be either (i) the settlement constituted by the codicil or (ii) the settlement constituted by the deed of October 25, 1941, in conjunction with the order of November 1, 1940, or (iii) the settlement constituted by the combined effect of the codicil, the deed and the order.

(4) The property comprised in the settlement constituted by the codicil was clearly the fund of capital represented by the retained shares together with the income arising from that fund. But admittedly there was no dutiable passing of any part of that fund on the death of the deceased under the trusts of the settlement constituted by the codicil taken alone. It is therefore necessary to look further in order to make good the claim to duty.

(5) If the settlement constituted by the deed and the order is regarded as the relevant settlement, then the property comprised in that settlement, or in other words the property of which it disposed, was (quoad the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter, and also (quoad the order) in the event of her death before the expiration of such period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with in the manner authorised by the order in lieu of accumulating it in accordance with the trusts of the codicil.

(6) If the settlement constituted by the combined effect of the codicil, the deed and the order is regarded as the relevant settlement the same result follows. The only property disposed of by the joint effect of these instruments was (quoad the codicil and the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter and (quoad the order), in the event of her death during the 21-year period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with as aforesaid.

(7) The only part played by the codicil was to provide for the benefit of the four shipping companies (and to the extent of any

intestacy) for the benefit of the daughter the limited interest in income subsequently disposed of by the deed, and to impose in the event of the daughter dying within the 21-year period the trust for accumulation during the residue of that period; and the only part played by the order was to authorise, not direct, the trustees, in that event, to apply the income arising during the residue of that period as if that period had in fact expired, in lieu of accumulating it as directed by the codicil. No trusts giving rise to any passing on the death of the deceased subsisted at his death by virtue of any instrument other than the deed, and the only property on which the deed could operate, or on which it could impose trusts, was the interest of the disposing parties, viz., the interest of the four shipping companies and the daughter in the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter.

The somewhat complicated and unusual nature of the trusts declared by the codicil, and the circumstance that the trusts declared by the deed are in favour of the same persons as those entitled under the trusts limited by the codicil to take effect after the expiration of the 21-year period, and are actually declared by reference to those trusts, tend to some extent to obscure the point at issue.

But it is in fact a question of considerable general importance, which so far as I can see enters into every case in which there has been a derivative disposition or settlement of a limited interest created by a previous settlement. I will attempt some examples.

A settles property on B for life with remainder to B's children. B assigns his life interest to C, who dies in the lifetime of B. On the death of C what duty is payable? On the trustees' view of the matter there would pass on the death of C, as part of his free estate, property consisting of the residue of B's life interest, the value of which would be actuarially ascertained as at the death of C, and no liability to duty on the corpus of the fund would arise until the death of B, the cesser of whose life interest would attract duty in the ordinary way. On the view contended for by the commissioners, as I understand it, the capital of the entire settled fund would pass on C's death and attract duty accordingly, on the ground that the whole of it then changed hands, besides which duty on the capital of the entire settled fund would become payable in the ordinary way on the death of B, by virtue of the cesser of his life interest under the settlement. It seems to me that this cannot be right.

As a further example, one may take the case of a settlement of property by A on B for life with remainder to B's children, followed by a settlement by B of his life interest on X for life with remainder to X's children. X dies in the lifetime of B. According to the trustees' contention the property passing on the death of X would be the property in which X's life interest subsisted, i.e., the life interest of B, and the passing on the death of X would be limited to that property, the principal value of which would be actuarially ascertained as at the death of X. According to the commissioners' contention, duty would be exigible on the death of A on the capital of the entire settled fund as in the first example, besides being exigible in the ordinary way on the subsequent cesser of B's life interest. Again, it seems to me that this cannot be right.

As a third and final example, one may take the case of a settlement by the will of a testator A of his residuary estate in trust for X during the period of 21 years from A's death or until the previous death of Y, with a trust for accumulation from the death of Y until the expiration of the 21-year period in the event of Y dying before such expiration, followed by a life interest to Z with remainder as to capital and income in trust for Z's children at 21 or marriage. X executes a declaration of trust of his limited interest above described, under which that limited interest is to be held in trust for Z for life with remainder to Z's children as above. Z dies before the expiration of the 21-year period and in the lifetime of Y. In this simplified version of the present case the commissioners' contention involves the conclusion that on the death of Z there would be a passing not merely of the property comprised in the declaration of trust made in Z's favour by X, i.e., the income to arise from the residuary estate during the period until the expiration of 21 years from the death of the testator or the previous death of Y, which was all X had to dispose of, but of the capital of the entire residuary estate. Again, it seems to me that this cannot be right.

In all three examples, and in all comparable cases, it appears to me that the true position in fact and in law is that a limited interest conferred on a person by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest in it, and that any subsidiary limited interests carved out of the limited interest disposed of are to be regarded as taking effect exclusively out of and to the extent of the limited interest disposed of and not otherwise. I see no sufficient reason for regarding them in any other way for estate duty purposes.

The commissioners' view would seem to produce somewhat remarkable results. For instance, it would mean that a life tenant could by an appropriate disposition of his life interest in a settled fund subject the capital of the fund, in which he had no interest whatever, to a claim for duty on the death of any person on whom he might choose to confer a life interest carved out of, and necessarily limited in its duration to the duration of, his own life interest. This seems to me absurd.

There is a remarkable dearth of authority on this question, which must have arisen time and again since 1894.

The authors and editors of three well-known works on death duties appear on the whole to favour the trustees' view (see Dymond, 12th ed., pp. 52, 88; Hanson, 10th ed., p. 178; Green, 4th ed., p. 53), though it is right to add that some doubt is expressed in Dymond at p. 88. All three works state the practice of the office to be in accordance with the trustees' view. But the question must depend on the true construction of the relevant legislation, which is a matter for the court.

The point was touched on in *In re Harrison's Settlement* [1] by Upjohn J., who was disposed to favour the view of the trustees in the present case.

Mr. Pennycuick, for the trustees, founded one of his arguments on the provisions as to settlement estate duty in section 5 (1) and (2) of the Act of 1894, which though repealed (with an immaterial saving in favour of the parties to a marriage) by sections 14 and 18 of the Finance Act, 1914, may, I think, properly be looked at for any aid they can give to the construction of section 1 of the same Act. As I understood this argument, it was to the effect that if section 5 (1) and (2) of the Act had remained in force the Crown could not have claimed settlement estate duty on the death of the deceased on the ground that the property, in the shape of the capital of the retained shares, passed on the death of the deceased under the disposition constituted by the deed of October 25, 1941, because that deed plainly effected no disposition of such capital, and that such a claim could only have been made good on the footing that the property which passed under that disposition was the limited interest in income to which it related. I may have misapprehended this argument, but it seems to me to come perilously near to begging the question, and I prefer to found myself on the more general considerations advanced by Mr. Pennycuick.

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[1] (1956) 35 Annotated Tax Cas. 144, 145.

On the commissioners' side reference was made to section 15 (1) and (2) of the Finance Act, 1896, as mitigating the hardship alleged by Mr. Pennycuick to ensue from the method of assessment contended for by them. This is an argument to which I can attach little weight. The exemptions afforded by the two subsections referred to are restricted in scope and would cover only a small proportion of the possible types of derivative settlements.

We were referred to the well-known case of *Attorney-General* v. *Milne and Another*[2] for the observations made by Lord Parker of Waddington. This case was, I think, introduced into the discussion by Mr. Pennycuick in connection with his argument concerning section 5 of the Act of 1894; but I refer to it for Lord Parker's general statement as to the effect of section 1. It is in these terms: "The first section of the Finance Act, 1894, imposes "in the case of every person dying after August 1, 1894, a duty, "called 'estate duty,' leviable on the capital value of all property "which passes on the death of such person. The expression "'property passing on the death' includes, according to the "definition contained in the 22nd section of the Act, property "passing either immediately on the death or after any interval "either contingently or certainly, and either originally or by way "of substitutive limitation, and the expression 'on the death' "includes 'at a period ascertainable only by reference to death.' "The expression 'passing on the death' is not further defined, "but is evidently used to denote some actual change in the title "or possession of the property as a whole which takes place at "the death. For the purpose of this section it is absolutely "immaterial to whom or by virtue of what disposition the "property passes."

I cannot regard this general statement as meaning that where duty is claimed under section 1 on property comprised in a settlement on the death of a deceased person, on the ground that "some actual change in the title or possession of the property "as a whole" took place on his death under the trusts of the settlement, it is not necessary to ascertain what property was comprised in the settlement, and what was the nature of the trust relied on as bringing about the dutiable change in title or possession on the death in question.

We were also referred to *Christie* v. *The Lord Advocate*,[3] where the daughter of the testator was entitled under his will to one-tenth of the income of the trust fund thereby constituted, reducible to a maximum of £600 per annum on the death of her mother. The daughter having died in the lifetime of her mother, it was held that there was a passing on the death of the daughter of the one-tenth of the capital of the trust fund corresponding to the one-tenth share of income to which she was entitled at the time of her death, and an argument that what should be valued for estate duty purposes was the right to one-tenth of the income during the life of the widow, reducible on her death to an annual sum not exceeding £600, was rejected. That case gives effect to a well established principle which I would not challenge for a moment; but it does not appear to me to touch the question as to the property comprised in the settlement which is the substantial point at issue here.

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[2] [1914] A.C. 765, 779, 780.

[3] [1936] A.C. 569; [1936] 1 All E.R. 443.

I would, however, quote this passage from *Christie* v. *The Lord Advocate* [4] as having some bearing on the present case: "As Lord Macnaghten stated in the *Cowley* case,[5] the Finance "Act, 1894, has no regard to the destination of the property which "passes or to the interest of the deceased, which, if it be a limited "interest, can never pass. It was held in that case that on the "death of the first equitable tenant for life under a settlement "of real estate the property which passed on his death was "neither the interest of the first tenant for life nor the interest "of the second tenant for life who succeeded him, but the settled "property. That case, in my opinion, is conclusive, and establishes that on the death of Mrs. Norman, the liferenter of "one-tenth, the settled property (which for this purpose is the "capital fund which produced the income to which she was "entitled) passed on her death within the meaning of section 1 "of the Act."

That passage appears to me to be wholly consistent with the trustees' contention in the present case. That which passed on the death of the deceased was the settled property, and the settled property was (quoad the deed) the income arising from the retained shares during the 21-year period or until the previous death of the daughter, and (quoad the order), in the event of the daughter's death during that period, so much (if any) of the income arising during the residue of that period as the trustees might think fit to distribute under the authority given by the order in lieu of accumulating it under the trusts of the codicil.

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[4] [1936] A.C. 569, 576.

[5] [1899] A.C. 198, 212.

I now turn to Mr. Milner Holland's argument that the combined effect of the order and the deed was to accelerate the interests in the income of the retained shares which, according to the trusts of the codicil, were only to come into operation after the expiration of the 21-year period. For the purposes of this part of his argument, Mr. Milner Holland, while not admitting, was not concerned to dispute the general principles regarding derivative settlements propounded by the trustees. He said (in effect) that whatever the position might be in other cases, in the present case the result of the deed and the order was to put the deceased in immediate possession of the income interest to which under the terms of the codicil he was only to become entitled at the expiration of the 21-year period, and in the event of his being alive at such expiration.

Under the deed (so the argument proceeded) the deceased by virtue of the referential trust thereby declared became entitled in possession to such share of the income of the retained shares during the 21-year period or until the previous death of the daughter as should from time to time be directed to be applied for his benefit. Under the codicil he was already entitled in expectancy to a like interest in the income of the retained shares after the expiration of the 21-year period, provided he should then be living. It is true that under the codicil there was interposed between these two interests a trust for accumulation of the income from the death of the daughter until the expiration of the 21-year period in the event of her death during that period. But this trust was virtually abrogated by the order which authorised the trustees in lieu of accumulating the income to deal with it on the footing applicable to income to arise after the expiration of the 21-year period. In the result, therefore, the deceased was at the time of his death entitled in possession to a share (fixed by the current direction at one-fifth) of the income of the retained shares during the lives and life of the nephew and the nephew's wife and the survivor of them, defeasible on his death in the lifetime of such survivor, and liable also in the event of the death of the daughter during the 21-year period to be temporarily defeated during the residue of that period if, and to the extent to which, the trustees might in that event decide to accumulate the income during the residue of that period notwithstanding that the order authorised them not to do so. The risks of defeasance or interruption attending the deceased's income interest as above described do not affect the claim to duty on a share in the capital of the trust fund corresponding to the share of income to which (no matter for what period) the deceased was entitled in possession at the time of his death. (See *Christie* v. *The Lord Advocate*.[6])

I cannot accept this argument. There was nothing here in the nature of a surrender or release. The deed, as it appears to me, disposed of the income of the retained shares during the 21-year period or until the previous death of the daughter as a distinct item of property, and on the footing that during the 21-year period or until the previous death of the daughter and no longer the referential trust was to take effect with respect to that property by virtue of that deed. It is in my view quite wrong to disregard the trust for accumulation or to invert the true position in regard to it by treating it as a trust for accumulation of so much (if any) of the income as the trustees might decide. It remained (in the contingency of the daughter's death during the 21-year period) a trust for accumulation save in so far as it might be displaced by any decision of the trustees to distribute without regard to it in reliance on the authority given by the order. It appears to me that the interposition of the trust for accumulation effectively prevented the transaction from bringing about the suggested acceleration and precluded any merger or coalescence of the trusts declared by the codicil after the expiration of the 21-year period and the trusts declared by the deed in respect of the income arising during the 21-year period or until the previous death of the daughter.

Some colour is lent to this part of Mr. Milner Holland's argument by the circumstance that the trustees of the deed were the same persons as the trustees of the testator's will and codicil. But this cannot in my view affect the legal position.

For the reasons I have endeavoured to state, I accept the trustees' contention as to the property comprised in the settlement and passing on the death of the deceased, and reject the commissioners' contention as to acceleration.

As to the commissioners' alternative claim under section 2 (1) (*b*), no such claim can arise on the footing that section 1 is applicable, and in any case a claim on that basis, if it could be entertained, could only produce the same result on the footing that the trustees' contention as to the property comprised in the settlement is accepted, as I think it should be.

For these reasons I would allow this appeal.

[6] [1936] A.C. 569.

ROMER L.J. I agree. I am quite unable to accept the trustees' contention that Geoffrey Harrison was a member of a discretionary class consisting of himself and his two sisters and that accordingly no income passed or could be deemed to have passed on his death within the meaning of section 1 or section 2 of the Finance Act, 1894. I agree with the reasons stated by Jenkins L.J. in his judgment, which I have had the advantage of reading, for rejecting this submission and have nothing to add with regard to it.

On the principal question it is, I think, clear that on the death of Geoffrey on October 7, 1955, estate duty became payable under section 1 of the Act. The reason for this is that the share of income from the retained shares which he was enjoying at his death became payable thereafter to other persons, viz. his sisters or one of them. As a result there was a passing of property on his death and the only question is—of what did that property consist? The judge held that the property was one-fifth of the capital of the retained shares settled by the testator's codicil; the appellants contend in effect that it was one-fifth of the property settled by the deed of October 25, 1941.

The terms of this deed were not precisely in accord with the order made by Simonds J. on November 1, 1940. That order required that the interests of Jeannette Wightman-Harrison and the steamship companies in the income to arise from the shares settled by the codicil and the investments for the time being representing the same during the period of 21 years from the date of the testator's death should be "assured" to the trustees of his will. The deed of October 25, 1941, did not assure these interests to the trustees but took the form of a declaration by Mrs. Wightman-Harrison and the companies that the interests should be held by the trustees upon the referential trusts therein mentioned, which were in fact the trusts authorised by the order. It seems to me, however, that this discrepancy between the order and the deed is immaterial.

The "interests" dealt with by the order and the deed were the beneficial interests of the companies in the income of the retained shares during a period of 21 years from the testator's death or until the daughter's earlier death and such interest as the daughter herself might have in the same income, and for the same period, as the testator's sole next-of-kin. This income was the only relevant property which the companies and Mrs. Wightman-Harrison possessed and they settled it by the deed of 1941.

Immediately prior to the execution of this deed Geoffrey had no beneficial interest whatever in this property of Mrs. Wightman-Harrison and the shipping companies. The property was certainly income, payable for an uncertain but limited period, of the retained shares but (apart from the " authority " conferred on the trustees by the order of 1940) Geoffrey's only beneficial interest in any income of the retained shares was expectant on his surviving the testator by 21 years. It seems to me that the effect of the deed of 1941 was not to accelerate Geoffrey's interest in the retained shares under the codicil trusts but to create new interests under a separate trust, which had not existed previously, of segregated property. The fact that the limitations of the income declared by that trust were, by reference, the same as those of the codicil trusts under which Geoffrey would have become entitled had he lived long enough, does not prevent the limitations from constituting a separate and independent trust, and I think that they did. If that view be right it follows, as it seems to me, that the beneficial interest which Geoffrey was enjoying at the time of his death was an interest arising under the deed and not an interest arising under the codicil. What, then, was the " property " in which that interest subsisted? The answer to that question must surely be the property settled by the deed, namely, the income of the retained shares of which Mrs. Wightman-Harrison and the shipping companies were the beneficial owners. This answer would perhaps have been still clearer if the " assurance " envisaged by the order of 1940 had been effected and if such assurance had been made in favour of trustees other than the trustees of the testator's will and codicil; but in my opinion the transaction, even in the form which it took, sufficiently established a sub-settlement of " property " which, although deriving in a sense from the codicil settlement, had an independent existence of its own. Mr. Pennycuick submitted in effect that the expression " settled property " in section 1 of the 1894 Act is referable to property which is settled by a disposition and which passes under *that* disposition; and that the section should in this regard be confined to property passing under a disposition on the death of a person entitled under *that* disposition. It appears to me that, at all events in general, this contention is well founded and, applying it to the present case, the disposition under which Geoffrey was entitled at his death to one-fifth of the income of the retained shares was, in my opinion, the deed of 1941 and not the testator's codicil. The fact that but for the provisions of the codicil the deed could have had no effective operation has, as it seems to me, no relevant materiality. On these grounds it appears to me that the appellants are entitled to the declaration claimed subject to the point, to which my Lord has referred, that regard should also be had to the benefit which might have accrued to Geoffrey during the 21-year period under the authority conferred on the trustees by the order of 1940.

The considerations which, if correct, defeat a claim to duty under section 1 of the Act on the value of one-fifth of the corpus of the retained shares also, by parity of reasoning, are an answer to the Crown's alternative claim based on section 2 (1) (*b*).

Jenkins L.J. I am authorised by Willmer L.J. to say that he concurs in the judgments which have just been delivered.

Appeal allowed. Leave to appeal.

Solicitors: *Gerrish & Co.; Solicitor for Inland Revenue.*

F. R. D.

1958
April 30;
May 1.

Harman J.

In re NOS. 55 & 57, HOLMES ROAD, KENTISH TOWN. BEARDMORE MOTORS LTD. *v.* BIRCH BROS. (PROPERTIES) LTD.

Landlord and Tenant—Business premises (Security of tenure)—Limitation — Application for new tenancy — Summons naming wrong respondents—Application to amend—Amended summons served out of time—Effect on vested rights—Whether amendment proper—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 29 (3)—*R.S.C., Ord.* 53D, *r.* 3 (2).

Practice—Parties—Misdescription—Amendment—Limitation of action.

Limitation of Action—Vested right to limit—Amendment of proceedings—Misdescription of parties.

On March 24, 1932, the applicants took an assignment of a lease of premises due to expire at Christmas, 1957. The lessors were Birch Bros. Ltd. On March 29, 1947, the freehold reversion expectant on the term was assigned by Birch Bros. Ltd. to Birch Bros. (Properties) Ltd., who were registered as freeholders on September 10, 1947. Birch Bros. (Properties) Ltd. was not a subsidiary of Birch Bros. Ltd., though the two had the same office, secretary and directors. On April 16, 1957, Birch Bros. (Properties) Ltd. served on the applicants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating the tenancy at Christmas, 1957. On June 13, 1957, the applicants served a counter-notice on Birch Bros. (Properties) Ltd., and on July 30, 1957, within the time required by the Act, issued a summons applying for a new tenancy under section 24 (1) of the Act, and naming Birch Bros. Ltd. respondents. The summons was served by a process server on the secretary common to both companies. On October 17 the master granted the applicants leave ex parte to amend the summons by altering the respondents' name. On October 28, out of time, the amended summons was served on Birch Bros. (Properties) Ltd., who now asked that the amendment be struck out and the summons dismissed:—

Held, that the mistake was more than a mere misnomer; and that the applicants' failure to serve a summons on Birch Bros. (Properties) Ltd. within the time prescribed by section 29 of the Landlord and Tenant Act, 1954, for applying for a new tenancy, gave Birch Bros. (Properties) Ltd. a vested right; and that the court, proceeding on the analogy of R.S.C., Ord. 16, r. 11, should not, by allowing the amendment, divest them of a right in favour of which time had run.

W. Hill & Son v. *Tannerhill* [1944] K.B. 472; 60 T.L.R. 410 and *Alexander Mountain & Co.* v. *Rumere Ltd.* [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.) distinguished.

ADJOURNED SUMMONS.

By a lease dated October 31, 1907, and made between Birch Bros. Ltd. and W. Parkyn & Sons Ltd., premises known as Nos. 55 and 57, Holmes Road, Kentish Town, were demised to W. Parkyn & Sons Ltd. for a term of 50 years and a half quarter from October 31, 1907. On March 24, 1932, the term was assigned to the applicants, Beardmore Motors Ltd. On March 29, 1947, the freehold reversion expectant on the term was assigned to Birch Bros. (Properties) Ltd., a company which was formed specially for the purpose of taking over the properties owned by Birch Bros. Ltd. The two companies, Birch Bros. Ltd. and Birch Bros. (Properties) Ltd. had a common office, a common directorate and a common secretary. Birch Bros. (Properties) Ltd. were registered as freeholders of the premises on September 10, 1947.

On April 16, 1957, the landlords, Birch Bros. (Properties) Ltd., served upon the applicants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating their tenancy at Christmas, 1957 (the date of expiry of the lease), and stating that they would oppose the tenants' application for a new tenancy. By a counter-notice dated June 13, 1957, the applicants gave notice to Birch Bros. (Properties) Ltd. of their unwillingness to give up possession of the premises.

By originating summons issued on July 30, 1957, the applicants, Beardmore Motors Ltd., applied for a new tenancy under section 24 (1) of the Landlord and Tenant Act, 1954. The summons was addressed to Birch Bros. Ltd., and was served by a process server on the secretary of Birch Bros. Ltd. and Birch Bros. (Properties) Ltd. The solicitors to Birch Bros. Ltd., seeing that the wrong respondents had been named in the summons, notified the applicants' solicitors of the mistake before August 16, 1957, but the applicants took no steps to amend until October 17, 1957, when the master gave the applicants leave ex parte to amend their summons. Pursuant to the said leave, the summons was amended by the insertion of the word "(Properties)" between "Birch Bros." and "Ltd." in the name of the respondents on October 18, 1957. The amended summons was served on Birch Bros. (Properties) Ltd. on October 28, 1957. At the hearing before the master on November 14, the respondents took the point that leave to make the amendment should not have been granted, and that at the time the amendment was made the period of limitation prescribed by section 29 of the Landlord and Tenant Act, 1954, for issuing an application for a new tenancy against Birch Bros. (Properties) Ltd. as landlords had expired, that the amendment should be struck out and the summons dismissed. The master gave leave to make the amendment, and on the hearing before Harman J. the respondents argued as a preliminary point that the amendment should be struck out.

P. G. Langdon-Davies for the respondents. Since the respondents were only made parties to the application either at the date of the amendment or at the date when the summons was first served on them (both of which dates are conceded to be out of time), the court cannot entertain the application by reason of section 29 (3) of the Landlord and Tenant Act, 1954. Alternatively, since the amendment to the summons deprived the respondents of a defence which would have been open to them had the summons been originally taken out at the date of the amendment, it is an amendment which should not be allowed. The rule is that the court will not allow a party to be added if a defence under a statutory limitation provision would be defeated thereby. The judgment of Denman J. in *Challinor* v. *Roder*[1] to the contrary was expressly disapproved by Scrutton L.J. in *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*,[2] which is the leading case on this point. [Counsel also referred to *Hudson* v. *Fernyhough*[3] and *Weldon* v. *Neal*.[4]] In such cases the law has placed a fetter on the judicial discretion to allow amendments. The cases cited were decided on the Statute of Limitations, but the wording of section 29 (3) is equally mandatory and the principle is the same. This is not a case of an amendment to correct a misnomer. Here there were two companies, as the applicants well knew, and they issued the summons against the wrong one. This is really an application to add a new party, not to correct the name of an existing one.

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[1] (1885) 1 T.L.R. 527.

[2] [1932] 1 K.B. 485.

[3] (1889) 61 L.T. 722.

[4] (1887) 19 Q.B.D. 394.

Further, R.S.C., Ord. 53D, r. 3, requires the applicant's landlord as defined by the Landlord and Tenant Act (in this case the present respondents) to be made respondent to the summons. Until that rule (which is mandatory) is complied with, there is no application under the Act. Therefore in this case no application was made within the prescribed time. [*Osborne* v. *Snook* [5] was also referred to.]

Arthur Bagnall for the applicant. This application was "made" on the day the original summons was issued, July 30, 1957. It is admitted that the respondents were misdescribed by calling them Birch Bros. Ltd. instead of Birch Bros. (Properties) Ltd., but that is a mere misdescription which will not be fatal to the application.

The court has an inherent jurisdiction to correct a mistake of this sort: *W. Hill & Son* v. *Tannerhill.* [6] This is a case of a landlord being sued in the wrong name; by a slip of the pen one word was left out and the wrong corporate name was given. The identity of the corporate person remained the same throughout and it is not against the policy of the law to permit correction of the name. On the authority of *Alexander Mountain & Co.* v. *Rumere Ltd.* [7] a mere misnomer, which is this case, can always be amended.

Alternatively, if this is not a case of misnomer, nevertheless to insert the name of the landlords as respondents would only be an exercise of the amending power of the court, frequently resorted to under the Rules of the Supreme Court, to insert the word "Properties." Rule 3 of Ord. 53D is one made under section 99 (1) of the Judicature Act, 1925; it can be amended if justice requires, and is subject to all other relevant rules. Power to add parties is to be found in Ord. 53D, r. 6. Under Ord. 70, r. 1, it is expressly stated that non-compliance with any of these rules shall not necessarily render the proceedings void but that a judge can order amendment if he thinks it proper. *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*[8] is distinguishable from the present case. There is no question here of divesting the respondents of a vested right.

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[5] [1953] 1 W.L.R. 322; [1953] 1 All E.R. 332.

[6] [1944] K.B. 472; 60 T.L.R. 410.

[7] [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.).

In any event, Ord. 53D contains a complete code of rules for proceedings under the Act of 1954, and Ord. 16, r. 11, is not material. If, therefore, an amendment were allowed, the application would have been made at the date of issue of the summons in its original form.

Langdon-Davies, in reply, was not called upon on the misnomer point.

With regard to the argument on the rules, Ord. 53D, r. 3, is validly made under the powers conferred on the rules committee by section 99 (1) of the Supreme Court of Judicature Act, 1925, and is mandatory in form. Therefore, prima facie, it must be complied with. It is true that, like other rules, it is subject to the provisions of Ord. 70, r. 1, but the court in exercising its discretion under the latter rule is bound by the same fetter of law with regard to not depriving parties of vested rights as it is in exercising its discretion under other rules. For this reason, the applicants, having failed to comply with the rules, cannot invoke the discretionary power given by Ord. 70, r. 1.

HARMAN J. stated the facts and continued: The section relevant for this purpose is section 29 of the Landlord and Tenant Act, 1954. Section 29 (3) provides: " No application under sub-" section (1) of section 24 of this Act shall be entertained unless " it is made not less than two nor more than four months after " the giving of the landlord's notice under section 25." The landlords' notice under section 25 was given on April 16; therefore there were four months to run to August 16. Consequently the originating summons issued on July 30 was in time, but the amendment was out of time.

The first objection taken is that it is not a matter of discretion; the court has no power to entertain this application, it is said, because it was not made within four months from April 16. The first point taken by the applicants in answer to that is that the application was " made " on July 30. The applicants admit that they misdescribed the respondents, but they say that that is not a matter which is fatal; a mere misdescription will never be effective to defeat the application. The necessary amendment can and ought to be allowed, and that will not cause the application to bear a date later than that of its original issue, because there is an inherent jurisdiction to correct a mistake of this sort.

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[8] [1932] 1 K.B. 485.

The first case which was cited in support of the applicants' contention was *W. Hill & Son* v. *Tannerhill*.[1] The headnote reads: " W. Hill, an individual trading alone and without partners " as ' W. Hill & Son,' issued a writ in the firm name contrary to " R.S.C., Ord. 48A, r. 1. The period of time prescribed by the " Limitation Act, 1939, within which the action must be brought, " having expired, W. Hill applied for an order substituting as " plaintiff in the action ' W. Hill trading as W. Hill & Son ': " *Held*, that, as W. Hill was an actually existing person and the " real plaintiff in the action, he was entitled to the order." Scott L.J. in the leading judgment acknowledges the principle that one must not make an amendment so as to divest a vested right of another party, the leading case for that proposition being *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*[2] But, says the Lord Justice, that did not apply to the kind of case that he had before him. He says that the plaintiff always was W. Hill; he misdescribed himself, having regard to the rules, as W. Hill & Son. But to put that right was not to interpose a new plaintiff or to alter the effect of the Limitation Act, 1939, because the right person was always there.[3] I understand and accept that principle, but is that the case here?

I ought in this connexion to refer to *Alexander Mountain & Co.* v. *Rumere Ltd.*[4] The headnote there is[5]: " In the case " of the mere misnomer of a plaintiff on a writ, the defendant, " by a summons supported by an affidavit, can compel the " plaintiff to amend. If the defendant does not exercise this " power, and the matter proceeds to trial, the misnomer can " then be amended, and in no circumstances can it affect the " substantive judgment which the court is called on to pro- " nounce." The Court of Appeal overruled Lord Goddard C.J. in the matter, and Cohen L.J. decided the point largely upon an article in the Law Journal of May 9, 1942, p. 150, to which he lent his approval in his citation. It goes like this[6]: " ' it is " ' submitted that there never was a time, not even in the " ' days before the rigour of the procedure at common law had " ' been modified by statute, when such a judgment on the trial " ' of an action could have been appropriate in a mere case of

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[1] [1944] K.B. 472; 60 T.L.R. 410.

[2] [1932] 1 K.B. 485.

[3] [1944] K.B. 474, 475.

[4] [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 144, 483 (C.A.).

[5] [1948] 2 K.B. 436.

[6] Ibid. 436, 441.

" ' misnomer. It may be doubted whether it would have occurred " ' to anyone in the above case to suggest a judgment in this form " ' if the plaintiff had been an individual, one of whose names had " ' been omitted, or wrongly abbreviated, instead of a corporation. " ' There is, however, no magic in the name of a corporation. It " ' is true that a corporation, whether limited or otherwise, can " ' sue only in its corporate name, but, equally, an individual can " ' only sue in his proper name.' "

Mr. Bagnall, in a persuasive argument, says that this was merely a case of the landlord being sued in the wrong name. The applicants intended to sue the right respondents, but by a slip of the pen a word was left out and the wrong corporate name was given. But the identity of the person (albeit an artificial person) remained the same. Therefore the application was made within time, and the mere amendment of the name will not be against the policy of the law. The answer put forward to that argument —and I think the conclusive answer—is that here there are two existing companies, one Birch Brothers Ltd., and the other Birch Brothers (Properties) Ltd. The applicants knew that there were two such companies; they also knew that Birch Brothers (Properties) Ltd. were their landlords, but they chose to sue Birch Brothers Ltd. I cannot say that they intended, when they used the one title, to use the other. It is not as if the other title were that of a non-existing person, or that they were under any misapprehension. They simply gave the name of an existing company which they knew, and knew as not being their landlords, as respondents to the summons. It is not, in those circumstances, open to me to say that this was a mere misnomer. I can only assume that they intended to sue Birch Brothers Ltd., of whom they knew and who, indeed, were the original freeholders of this property, when they issued the summons in the way they did. Therefore, it seems to me, cases about mere misnomer have nothing whatever to do with this point.

The second point taken by the applicants is that the application was made on the day it was first issued, namely, July 30, 1957, notwithstanding that the wrong respondents were there named, and that to insert the right respondents is a mere exercise of the amending power which the Rules of the Supreme Court give and which is frequently resorted to. The rules, which are embodied in R.S.C., Ord. 53D, are mandatory in form, and they are made not in accordance with any rule-making power given by the Act but by the rules committee under section 99 of the Judicature Act, 1925, to which I will refer in a moment.

Rule 3 ordains that an application for a new tenancy under section 24 of the Act of 1954 shall be made by originating summons in the Chancery Division, stating the premises to which the application relates and the business carried on there, particulars of the current tenancy, and the applicant's proposal as to the new tenancy. Secondly, it states that the person who is the applicant's landlord as defined in section 44 of the Act of 1954 shall be made respondent to the summons. Rule 5 provides that no appearance need be entered to the summons. I think it is unfortunate for everybody that it was seen fit by the rules committee to provide that in this kind of application no appearance need be entered. Why they should make such a rule in matters which are necessarily highly controversial, and which, if I may say so, would be more suitable to proceedings by writ, I am quite unable to understand. If appearance were necessary, either Birch Brothers Ltd. would have appeared and would then have been in a position to take the point that they were not the landlords straight away, or Birch Brothers (Properties) Ltd. would have appeared under protest and moved to set aside the proceedings. Either way the issue would have been raised at an early stage. The rule provides that the summons must be returnable at a date which will allow at least 14 days to elapse between the date of service and the return date. What the effect of that may be remains to be decided hereafter. As far as I can see, having issued a summons, an applicant may put it in his pocket for as long as he chooses.

The respondents' objection to this summons, therefore, is that it does not name as the respondent to the summons, or it did not as issued, the person who is the applicants' landlord as defined by the Act. The rule, therefore, was not complied with. Therefore, say the respondents, it was not an application under section 24 (1) because it was not made in accordance with the rules. Prima facie, I think that must be so. It did not comply with the rules, and, therefore, was not an application "made," that is to say, properly made under the section. The applicants, however, contend that this is only a rule made by the rules committee like any other under the Judicature Act, and all such rules may be amended as justice requires. Section 99 (1) of the Judicature Act, 1925, says: "Rules of Court may be made under this Act for "the following purposes:—(*a*) for regulating and prescribing the "procedure . . . in . . . the High Court . . . in all causes and matters ". . . in which—[that court has jurisdiction]—and any matters "incidental to or relating to any such procedure or practice including . . . the manner in which, and the time within which, any "applications which under this or any other Act are to be made to "the Court of Appeal or to the High Court shall be made." So that the mandatory part of the rule which says that the landlord must be made a respondent is a provision which the rules committee were expressly entitled to make under section 99 (1) (*a*) of the Judicature Act. But it is a rule which, of course, is subject to any other relevant rule, and I am referred to R.S.C., Ord. 70, r. 1, which says: "Non-compliance with any of these rules . . . shall not "render any proceedings void unless the court or a judge shall "so direct, but such proceedings may be set aside either wholly "or in part as irregular, or amended, or otherwise dealt with in "such manner and upon such terms as the court or judge shall "think fit." I do not see any reason why I should direct that the proceedings are void. But the question is whether I ought to allow them to be amended under the discretion given me by the rest of the rule, and here comes in the question of policy.

It is said that the analogy to the passing of time under the Limitation Act has no bearing on the present case, because Order 53D is a code, and the court has power to amend as it chooses, and to add parties as it, in its discretion, sees fit, and no analogy to other statutes ought to be allowed to affect the matter. Rule 6 (3) of Order 53D provides that: "The preceding provisions of "this rule are without prejudice to the power of the court or "judge . . . to order notice of the proceedings to be given to any "person or any person to be made a party to the proceedings." Therefore the rules themselves, it is said, contemplate that a party may be added to the proceedings if the court thinks that he ought properly to be so added. The question for me, therefore, is whether I ought to allow an amendment of this sort, or whether I ought not to act by analogy to the refusal of the court to make amendments which divest a vested right. There is no doubt in the present case that Birch Brothers (Properties) Ltd., by August 16, 1957, could have said: "We have got through the four months since "we served our notice, and although the tenants served a counter-"notice, they have not taken any proceedings against us. We are "therefore free." That does seem to me to be a vested right. They were entitled, as its seems to me, to congratulate themselves and consider themselves free of that worry. Ought I to take that away from the landlords by a subsequent amendment? If one turns to Ord. 16, r. 11 (which is at least analogous even if it is not the pertinent rule in the case), it speaks of misjoinder and nonjoinder, and provides: "No cause or matter "shall be defeated by reason of the misjoinder or nonjoinder of "parties. . . . The court . . . may, at any stage of the proceedings ". . . order that the names of any parties . . . be added. . . . "Every party whose name is so added as defendant shall be "served with a writ of summons or notice . . . and the proceedings as against such party shall be deemed to have begun "only on the service of such writ or notice." So that if the present proceedings had been begun by writ and an amendment had been allowed adding Birch Brothers (Properties) Ltd., and they had been served (as they must have been) with the writ, the writ would only have run against them from the date of its service, and would, therefore, be out of time. It is suggested that that analogy ought to apply here, and that either I should not allow the amendment by adding Birch Bros. (Properties) Ltd. at all, because this is not mere procedure but concerns fundamental vested rights, or, if I do allow them to be added, it would be futile because they must then be treated as parties as from the day when the amendment was made, which was too late.

I do not see any answer to the last argument. Once I conclude (as I have done) that this was not a case of mere misnomer or misdescription, I ought not to depart from the well-settled rule that, where a man has a vested right in favour of which time has run—for instance, under the Limitation Act or in respect of the right to sue under Lord Campbell's Act—then that right ought not to be taken from him either by adding parties or adding causes of action which would bring in a new liability. Even if Order 53D is a code, I should proceed on the analogy of Order 16, rule 11, which specifically provides that, when an amendment is made by adding a defendant, proceedings shall not be, so to speak, antedated as against him.

Therefore, I conclude that the application to amend ought not to have been successful, and that the objection taken succeeds. I say with the greatest regret that it seems to me that the applicants are the authors of their own misfortune, having been given the chance to remedy what they had done, and having refused to take it. Therefore, I attach no weight to the fact that the two companies no doubt each knew what the other knew by virtue of their common board and common secretary, and that this in other circumstances might have been a highly technical and unmeritorious defence. I do not see that it would have made any legal difference though it certainly makes a difference to the unwillingness of the court to come to such a conclusion that

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the applicants were granted such a locus poenitentiae. I propose to send the matter back to chambers, striking out the name of the landlord company.

Order accordingly.

Solicitors: *Ballantynes; Gouldens.*

P. P.

1958
April 18.

Upjohn J.

In re HAMILTON-SNOWBALL'S CONVEYANCE.

[1957 P. 760.]

Vendor and Purchaser—Purchaser's interest before completion—Requisitioned premises—Compensation on derequisitioning payable to "owner" at date of derequisitioning—Contract of sale at that date—Completion—Claim by purchaser—Whether vendor a constructive trustee for purchaser of compensation money — Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *ss.* 1 (1), 2 (1) (*b*), 2 (3), 17 (1).

Emergency Legislation—Requisitioning.

On January 26, 1956, R. contracted to purchase certain premises already occupied by him, which had been requisitioned under the Compensation (Defence) Act, 1939, and on the same day R. contracted to sell the same premises to A. The contract between R. and A. contained no condition that the premises were sold subject to the requisitioning. On February 3, 1956, the premises were conveyed to R. and on February 6, 1956, they were derequisitioned, compensation thereby becoming payable on that date to the "owner" of the premises under the Compensation (Defence) Act, 1939.[1] The premises were conveyed by R. to A. on February 23, 1956.

[Reported by JENNIFER WEST, Barrister-at-Law.]

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[1] Compensation (Defence) Act, 1939, s. 1 (1): "Where, in the exercise of emergency powers during the "period beginning with the 24th day "of August, 1939, and ending with "such day as His Majesty may by "Order in Council declare to be the "day on which the emergency came "to an end,—(*a*) possession of any "land has been taken on behalf of "His Majesty . . . then, subject to "the following provisions of this "Act, compensation assessed in "accordance with those provisions "shall be paid, out of moneys pro-"vided by Parliament, in respect of "the taking possession of the land, "the requisition or acquisition of the "property, or the doing of the work, "as the case may be."

S. 2: "(1) The compensation pay-"able under this Act in respect of "the taking possession of any land "shall be the aggregate of the follow-"ing sums, that is to say . . . "(*b*) a sum equal to the cost of "making good any damage to the "land which may have occurred "during the period for which posses-"sion thereof is so retained (except "in so far as the damage has been "made good during that period by a "person acting on behalf of His "Majesty), no account being taken of

The question raised by the summons taken out under section 49 of the Law of Property Act, 1925, by A., was whether or not R., as the legal owner of the premises on February 6, 1956, should hold the compensation payable under the Act on a constructive trust for A., to whom he had contracted to sell the premises:—

Held, that a vendor under a contract of sale is only a qualified trustee for the purchaser of the premises with vacant possession, together with any physical accretions thereto, and not of any right to compensation moneys payable to him under Act of Parliament which did not, in the absence of express provision in the contract, form part of the subject-matter of the sale. Accordingly, R. was entitled to receive for his own benefit compensation payable to him as owner of the premises on February 6, 1956, under the Compensation (Defence) Act, 1939.

Rayner v. *Preston* (1881) 18 Ch.D. 1 and *In re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472; 36 T.L.R. 307 applied.

ADJOURNED SUMMONS.

Under the provisions of the Compensation (Defence) Act, 1939, certain premises known as 77, Glendale Avenue, Edgware, had been requisitioned by the Hendon Borough Council and had for 11 years before February 6, 1956, been in the occupation of George Hamilton-Snowball, the respondent to the summons (hereinafter called " the respondent "). On January 26, 1956, he contracted with the then owners of the premises to purchase the same for the sum of £2,100, completion to be on or before February 26, 1956. The premises were sold, inter alia, expressly subject to the requisitioning of the property and to the occupation of the property by the respondent.

Subsequent to that contract and also on January 26, 1956, the respondent contracted to sell the premises to Mrs. Anne Peters, the applicant to the summons (hereinafter called " the " applicant ") for the sum of £3,350. The contract contained no conditions that the premises were sold subject to the requisitioning nor to the respondent's occupation, the condition as to requisitioning being excluded because on the purchase of requisitioned premises by the occupier of such property derequisitioning would

" fair wear and tear or of damage " caused by war operations. . . . (3) " Any compensation under paragraph " (*b*) of subsection (1) of this section " shall accrue due at the end of the " period for which possession of the " land is retained in the exercise of " emergency powers, and shall be " paid to the person who is then the " owner of the land."

S. 17 (1): " . . . 'owner' means " —(*a*) in relation to land, the person " who is receiving the rackrent of " the land, whether on his own " account or as agent or trustee for " any other person, or who would so " receive the rackrent of the land if " it were let at a rackrent."

shortly follow. The contract was subject to the National Conditions of Sale, 16th ed., except conditions 13 and 16 (3) so far as such conditions were not inconsistent with the conditions following and were applicable to a sale by private treaty.

On February 3, 1956, the premises were conveyed by the original owners to the respondent and on February 6, 1956, they were derequisitioned. On February 23, 1956, the respondent conveyed the premises to the applicant who then entered into possession and occupation.

The Hendon Borough Council, as the local authority responsible, were willing to pay a sum of £236 together with £12 7s. 9d. compensation under section 2 (1) (*b*) of the Compensation (Defence) Act, 1939, and had agreed to abide by the decision of the court as to who was the proper person to receive such compensation under the Act. They were accordingly not made parties to the summons which was taken out under section 49 of the Law of Property Act, 1925, by the applicant to determine whether or not the respondent as the legal owner on February 6, 1956, should hold any compensation payable to him as owner under the aforesaid Act of Parliament on a constructive trust for the applicant.

Lionel A. Blundell for the applicant. A vendor of property is a trustee for the purchaser between the dates of the contract for sale and completion: *Shaw* v. *Foster.*[2] All advantages and all losses to the estate between these dates fall on the purchaser: see *per* Lord Cairns in *Shaw* v. *Foster.*[3] Since in equity the purchaser is the owner of the property after the date of contract, all things accruing to the owner by right of ownership only belong to the purchaser, while things accruing to the owner by other rights apart from ownership of the property sold, for example, through a lease, belong to the vendor: *Aberdeen Town Council* v. *Aberdeen University.*[4] In the present case compensation did not become payable to the respondent until after contract, and he was entitled to such compensation simply as owner of the property already contracted to be sold; he must, therefore, account to the purchaser for any such sums paid to him, since a trustee must make no profit from his trust. *In re Armitage's Contract*[5] was decided solely on a question of construction of the express words in a contract of sale, but if the respondent is right, there was no need to consider the express words at all.

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[2] (1872) L.R. 5 H.L. 321.

[3] Ibid. 333.

[4] (1877) 2 App.Cas. 544.

[5] [1949] Ch. 666; 65 T.L.R. 532.

W. G. H. Cook for the respondent. The fiduciary relationship between vendor and purchaser is a specialized one: the vendor is only a trustee of the property contracted to be sold together with any physical accretions thereto: see the statement of the law by Sir George Jessel M.R. in *Lysaght* v. *Edwards*,[6] by Cotton L.J. in *Rayner* v. *Preston*,[7] and by Sargant J. in *In re Lyne-Stephens and Scott-Miller's Contract*,[8] whose decision was confirmed by the Court of Appeal in that case. One must consider what was the property sold, and in the contract here there is nothing to include expressly the compensation moneys. Accordingly, on the contract and at completion the purchaser only became entitled to 77, Glendale Avenue, Edgware, with vacant possession. The compensation was properly payable to the vendor, since on February 6, 1956, he satisfied the definition of "owner" under the Act, and the contract of sale did not assign away his rights.

Blundell replied.

UPJOHN J. This is a vendor and purchaser summons under section 49 of the Law of Property Act, 1925, for the determination of the interesting question which has arisen as between the applicant, the purchaser of certain premises, and the respondent, as vendor of those premises, as to who is entitled to certain compensation moneys payable after the date of the contract but before completion under the provisions of the Compensation (Defence) Act, 1939.

[After stating the facts and reading the relevant sections of the Act of 1939 his Lordship continued:] Mr. Blundell, for the applicant, concedes that, having regard to condition 5 of the National Conditions of Sale, the respondent is, within the definition in section 17 (1) of the Act of 1939, the "owner" who is entitled to give a good discharge to the local authority, for he is the person who on February 6, 1956, was the person who would be entitled to receive the rack-rent of the land if it were let at a rack-rent, because that was before the date of completion.

Mr. Blundell has submitted that although the respondent was entitled to give a good receipt so far as the local authority is concerned, he in fact holds that compensation money as trustee for the applicant. He submits that, having regard to the general law applicable as between vendor and purchaser, the respondent is a trustee of the property contracted to be sold and trustee of all the accretions thereto that may happen to arise between the date of the contract and the date of completion; for example, timber that may fall; minerals that may be dug otherwise than under some pre-existing contract, and there may be various other accretions. He submits that this is an accretion of that nature. He points out, quite rightly, that this is not a sum which accrued due to the respondent before the date of the contract. The first time it accrued due was after the date of the contract when the derequisitioning was completed. He submits that it comes to the respondent solely as owner and not under any collateral contract and must therefore be accounted for by him as such.

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[6] (1876) 2 Ch.D. 499, 506.

[7] (1881) 18 Ch.D. 1, 8.

[8] [1920] 1 Ch. 472, 477; 36 T.L.R. 307.

Mr. Blundell agrees that the rights arising under some collateral agreement such as a policy of insurance do not enure for the benefit of the purchaser, but he submits that what does enure for the benefit of the purchaser is all rights which accrue to him solely as owner of the property.

He referred me for the general proposition to *Shaw* v. *Foster*,[1] for the statement by Lord Cairns. That is a very well-known passage and I do not think I need refer to it.

He also referred me to *Aberdeen Town Council* v. *Aberdeen University*,[2] where the Aberdeen Town Council under a transaction which was in Scottish form acquired certain fishing rights for themselves although they held the property as trustee for the Aberdeen University. It was held that they were accountable for those fishing rights to the Aberdeen University and could not use them themselves. That was a case of an express trustee and a cestui que trust, and it is only an illustration of a very much wider proposition that in such a case a trustee may not make any profit out of his trust. It does not seem to me to be helpful on a question as between vendor and purchaser.

He also referred me to *In re Armitage's Contract*.[3] In that case a somewhat similar problem arose, but Vaisey J. determined the matter solely upon the question of the true construction of certain express words appearing in the contract of sale, and it is no decision upon the matter I have to consider where there are no express words. Mr. Blundell, however, rightly pointed out that, if the respondents are right, it would have been quite unnecessary to consider in *In re Armitage's Contract* [3] the construction of the agreement, and he naturally relies upon the fact that it seems to have been assumed as far as one can make out that, if the compensation had not belonged to the vendor personally under the express words of the contract, it would have belonged to the purchaser. But the arguments and judgment are entirely silent upon the point.

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[1] (1872) L.R. 5 H.L. 321, 333.

[2] (1877) 2 App.Cas. 544.

[3] [1949] Ch. 666; 65 T.L.R. 532.

On the other side, Dr. Cook, for the respondent, says that the case of the fiduciary relation between vendor and purchaser is a very special one, and the vendor is only trustee of the property contracted to be sold, and, he submits, of any physical accretions thereto. He referred me to the observations of Sir George Jessel M.R. in *Lysaght* v. *Edwards*,[4] where he says[5]: "It appears to "me that the effect of a contract for sale has been settled for "more than two centuries; certainly it was completely settled "before the time of Lord Hardwicke, who speaks of the settled "doctrine of the court as to it. What is that doctrine? It is "that the moment you have a valid contract for sale the vendor "becomes in equity a trustee for the purchaser of the estate "sold, and the beneficial ownership passes to the purchaser, the "vendor having a right to the purchase-money, a charge or lien "on the estate for the security of that purchase-money, and a "right to retain possession of the estate until the purchase money "is paid, in the absence of express contract as to the time of "delivering possession."

He referred me also to some observations in the later case of *Rayner* v. *Preston*,[6] a decision of the Court of Appeal, which dealt with the question of insurance money arising between the date of the contract and the date of completion. He referred me in particular to the words of Cotton L.J.[7]: "It was said that the "vendor is, between the time of the contract being made and "being completed by conveyance, a trustee of the property for "the purchaser, and that as, but for the fact of the legal owner-"ship of the building insured being vested in him, he could not "have recovered on the policy, he must be considered a trustee "of the money recovered. In my opinion, this cannot be main-"tained. An unpaid vendor is a trustee in a qualified sense only, "and is so only because he has made a contract which a Court "of Equity will give effect to by transferring the property sold "to the purchaser, and so far as he is a trustee he is so only in "respect of the property contracted to be sold. Of this the policy "is not a part."

Finally he referred me to *In re Lyne-Stephens and Scott-Miller's Contract*.[8] In that case the property had been contracted to be sold with vacant possession, and there was in existence a lease which came to an end between the date of the contract and the date fixed for completion. The lease having expired, the dilapidations under the provisions thereof were agreed at £2,060, which was paid by the lessee into a joint account, the rights of the vendor and purchaser thereto being reserved. Sargant J., whose decision was affirmed in the Court of Appeal, held that the dilapidations were payable to the vendor. He dealt with the position of vendor and purchaser in a passage which I will now read, which was expressly approved by Lord Sterndale in the Court of Appeal in that case. Sargant J. said[9]: "The purchaser says that a vendor, speaking generally, is a "trustee for him of the property sold, subject to the completion "of the contract, and that when the completion takes place the "trust becomes an absolute one. A number of decisions were "cited for that proposition, one instance being the right of the "purchaser to any windfall of timber. The vendor does not "dispute that general proposition, but says: 'What was it that "'was sold? It was not the house subject to and with the "'benefit of the lease which was existing at the date of the con-"'tract, but it was the house with possession, altogether apart "'from and independent of the lease, the obligations and rights "'under which were simply and solely a matter between the "'vendor and the lessee.' In my judgment, that contention of "the vendor is correct." That seems to me to be the principle which must govern this case and I must look and see what was the property sold. It is quite clear that it was only the property 77, Glendale Avenue, Edgware, with a right, though not expressed in the contract, to vacant possession on completion. There is nothing in that contract, therefore, which expressly includes the right to the compensation money.

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[4] (1876) 2 Ch.D. 499.

[5] Ibid. 506.

[6] (1881) 18 Ch.D. 1.

[7] Ibid. 6.

[8] [1920] 1 Ch. 472; 36 T.L.R. 307.

The compensation money, as is now conceded, was properly payable to the vendor, the respondent, because at the date when it became payable on February 6, 1956, he was the person who satisfied the definition of "owner" in the Act in that he was entitled to receive the rack-rent if there were any.

It seems to me that the respondent was entitled to receive this sum under this Act of Parliament because the Act says that he is the person to receive it, and I cannot see that he has sold or assigned that right away under any contract of sale. The contract of sale did not, in my judgment, include or comprehend this compensation money. Had that been intended, then, in my view, it should have been expressly put in as part of the subject-matter of the sale. I cannot see how it is possible to say, in the circumstances of this case, that the respondent, who is entitled to receive it under the terms of the Act, becomes in some way a constructive trustee of that sum which he has not contracted to sell to the purchaser.

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[9] [1920] 1 Ch. 472, 477.

Accordingly, I must dismiss this summons with costs.

Declaration accordingly.

Solicitors: *Frank J. French & Co.; Worrell, Fordyce & Lys.*

BULLOCK *v.* UNIT CONSTRUCTION CO. LTD.

[1956 J. 2142.]

C. A.

1959
Jan. 20, 21, 22;
Feb. 12.

Jenkins, Romer and Pearce L.JJ.

Residence — Company — Income tax — Test of residence — " Superior or " directing authority "—Finance Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

Three companies, which were wholly owned subsidiaries of A. B. & Co. Ltd., a company resident in the United Kingdom, were at all material times registered and resident in East Africa. The boards of the three subsidiaries were entirely distinct from the board of the parent company but the board of the parent exercised control in matters of policy and in effect told the boards of the African subsidiaries what to do and those boards always accepted the instructions and acted accordingly.

The respondent company, also a wholly owned subsidiary of A. B. & Co. Ltd., made certain payments to the African subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the African subsidiaries were " resident " in the United Kingdom " within the meaning of section 20 (9) of the Finance Act, 1953,[1] then the payments in question were subvention payments which the respondent was entitled to deduct: —

Held, (1) that a company was resident where the superior or directing authority was; that authority being properly exercisable only within the framework of the constitution of the company.

Dicta of Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners* (1951–53) 34 T.C. 207, 271; [1952] 1 T.L.R.

[1] Finance Act, 1953, s. 20 (9): " For the purposes of this section " ' company ' includes any body corporate, but references to a company " shall be taken to apply only to a " company resident in the United " Kingdom and carrying on a trade " wholly or partly in the United Kingdom. . . ."

651; [1952] W.N. 119; [1952] 1 All E.R. 646, and of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15, 241 applied.

Scottish Co-operative Wholesale Society Ltd. v. *Meyer* [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66 and *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.* [1916] 2 A.C. 307; 32 T.L.R. 624 considered.

Statements of principle of Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455; 5 T.C. 198, of Lord Halsbury in *American Thread Co.* v. *Joyce* (1911–12) 6 T.C. 1; 28 T.L.R. 233 and of Lord Sumner in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* [1929] A.C. 1; 44 T.L.R. 747; 14 T.C. 119 explained.

(2) That, as under the constitutions of the African subsidiaries management and control was vested exclusively in the directors in Africa, a residence in the United Kingdom within section 20 (9) of the Finance Act, 1953, could not be attributed to them merely because the parent had usurped directing power.

Decision of Wynn-Parry J., ante, p. 147; [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186 affirmed.

APPEAL from Wynn-Parry J.[2]

At a meeting of the special commissioners held on May 15, 17, 18 and 24, 1956, the Unit Construction Co. Ltd. (hereinafter called "Unit") appealed against assessments to income tax made upon it under Case I of Schedule D for the year 1953/54 in the sum of £110,000 less £36,388 capital allowances, and for the year 1954/55 in the sum of £200,000 less £50,000 capital allowances.

The appeal concerned certain payments made by Unit, which Unit claimed to deduct in computing its profits for the purposes of the assessments under appeal. These payments comprised substantial sums paid to Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. in 1952 and 1953.

The sole question in dispute was whether Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. were, in 1952 and 1953, companies resident in the United Kingdom within the meaning of subsection (9) of section 20 of the Finance Act, 1953. It was common ground that if they were so resident, then the payments in question were subvention payments which Unit was entitled to deduct in computing its profits, by virtue of the said section 20.

The following facts appear from the case stated: Unit was a wholly owned subsidiary of Alfred Booth & Co. Ltd. Booth

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[2] Ante 147; [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186.

& Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. (which, when necessary to refer to them together, are hereinafter called "the African subsidiaries") were also wholly owned subsidiaries of Alfred Booth & Co. Ltd.

It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa.

Alfred Booth & Co. Ltd. was a company incorporated and resident in England, and was the parent of a group of 10 or more companies trading in many parts of the world. It was incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions, and it did carry on a number of businesses in different parts of the world (including, in particular, building contracting and businesses connected with the leather industry) all of which it had, by August, 1949, transferred to subsidiary companies incorporated for the purpose. In August, 1949, it adopted a new memorandum of association with the objects of an investment trust company, with power to carry on the business of banking.

The board of directors of Alfred Booth & Co. Ltd. met regularly in London. In addition to the board meetings, a committee of executive directors held weekly meetings in London. The chairman of the board of directors and of the executive committee was J. W. Booth; he had been a director since 1935; in May, 1950, he became a managing director (with special responsibility on the board and on the executive committee for the African subsidiaries); in July, 1952, he became chairman, and at the same time the special responsibility for the African subsidiaries was divided as under:

J. W. Booth was responsible for their general trading and mining interests; E. Booth (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their building interests; E. W. Espenhahn (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their hide and skin and tanning interests.

The African subsidiaries, which were incorporated in 1948 and 1949 with the objects set out in their respective memoranda of association were:

(a) *Booth & Co. (Africa) Ltd.* Building contracting in East Africa. A mining venture in Uganda. A forwarding agency at Mombasa, which acted principally as agent for the African subsidiaries themselves.

A merchanting business was carried on as a separate department under the name of Bulleys Trading Company.

(b) *Booth & Co. Ltd.* The business consisted in the earning of commissions by purchasing hides and in the purchase and sale of skins, and was conducted through a number of posts set up in East Africa. In the case of hides, the company acted as agents for Hollander Hyams Ltd. (a company which had no connection with the Alfred Booth & Co. Ltd. group of companies). This part of the business was governed by an agreement dated October 17, 1950, which allowed Booth & Co. Ltd. to supply a limited number of hides to Bulleys Tanneries Ltd. and other tanneries within the Alfred Booth & Co. Ltd. group of companies. In the case of skins the company acted as principals.

(c) *Bulleys Tanneries Ltd.* Manufacturing in Kenya leather for sale locally, and manufacturing or part-manufacturing leather for export to England, where the product was sold on behalf of Bulleys Tanneries Ltd. by Booth & Co. (England) Ltd.

Each of the African subsidiaries was incorporated in Kenya under the Kenya Companies Ordinance and had its registered office in Nairobi. The articles of association of each of them contained provisions placing the management and control of the business in the hands of its directors and providing that directors' meetings might be held anywhere outside the United Kingdom. It was the intention of the directors of Alfred Booth & Co. Ltd. (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also in order to forestall any question which might arise in connection with any future nationalisation, particularly of the building industry. It turned out, owing to disturbances in Kenya and other difficulties, that they incurred losses (except for the department known as Bulleys Trading Company, which made profits), and this was a source of great anxiety to Alfred Booth & Co. Ltd. which had sunk considerable sums of money in them, as it reflected in the financial position of the Alfred Booth group of companies as a whole. J. W. Booth, who was brought into the detailed control of the African subsidiaries, on his appointment as a managing director of Alfred Booth & Co. Ltd. in 1950, considered that the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of Alfred Booth & Co. Ltd. in London. He considered that his principal job was to manage them. The board of directors of

Alfred Booth & Co. Ltd., after discussions, decided that as a result of the lack of success of the African subsidiaries they were forced to take over management and control, in order to save their company's investment; at the same time it was their policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity should arise. There was at no time any formal agreement with the African subsidiaries that the directors of Alfred Booth & Co. Ltd. should manage them; the intention of the said directors to do so was communicated to one P. Meinertzhagen (the chairman of the board of directors of each of the African subsidiaries), and accepted by him. As a result, from 1950 onwards the directors of Alfred Booth & Co. Ltd. in London began to intervene in the affairs of the African subsidiaries in the manner hereinafter set forth; they were aware that their action in so doing might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation.

The chairman of the directors of each of the African subsidiaries was at all times P. Meinertzhagen. He had been (prior to 1948) an employee of Alfred Booth & Co. Ltd., in England, and went to Africa to form and supervise the African subsidiaries. He was not at any material time a director of Alfred Booth & Co. Ltd., he had no contract of service with any company in the group, and his remuneration took the form of a salary paid to him by Booth & Co. Ltd. (the other two African subsidiaries refunding Booth & Co. Ltd. part of it). He was described in the correspondence and in staff lists, as "Alfred Booth & Co. "Ltd., senior representative in East Africa."

The other directors of the African subsidiaries (who varied from time to time) were all persons employed by and holding contracts of service with the companies of which they became directors. Only one of them was a director of more than one of the African subsidiaries; this was one Trembath, who left in 1952, and was occasionally described or referred to as "Number "2" to Meinertzhagen. These directors were all elected to the boards of the African subsidiaries on the instructions of the parent company, Alfred Booth & Co. Ltd., and their contracts of service were made in London by Alfred Booth & Co. Ltd., as agent for the African subsidiary concerned. None of these directors was at any time a director of Alfred Booth & Co. Ltd. When occasion arose (as it did arise more than once) for removing one of them from office, the decision was taken in London by the directors of Alfred Booth & Co. Ltd., to determine his contract of service and remove him, and instructions to that effect were issued by Alfred Booth & Co. Ltd., to Meinertzhagen. When any question arose (as it did arise) of compensating a director or member of the staff of an African subsidiary for removal or dismissal, it was dealt with by the directors of Alfred Booth & Co. Ltd.; for this purpose they used Meinertzhagen as an intermediary, or as happened on one occasion, one of their number flew to East Africa to negotiate terms. The directors of the African subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.

The minute books of the directors' meetings of each of the African subsidiaries, recorded, in the main, only formal business (such as particulars of annual general meetings, appointments and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they recorded more important business, but in each such instance a decision had in fact been taken by the directors of Alfred Booth & Co. Ltd. in London and the record in the minute book of the African subsidiary merely formally records its implementation. Meinertzhagen is recorded as present at each such meeting, with one or two other directors; in many cases, however, the directors recorded as being present had not actually met at all and might not have known that any meeting was supposed to be taking place, as directors as a rule were not notified of any meetings. All the minutes purporting to record meetings prior to 1952 were written up in 1952, to comply with law, on the instructions of the directors of Alfred Booth & Co. Ltd. They were written up from records that had been typed and kept loose in a book by previous company secretaries. In most cases, where the minute book records a meeting and business transacted thereat, the business recorded was in fact transacted by Meinertzhagen (in all matters of any importance, on the instructions of Alfred Booth & Co. Ltd.) and the minute was written afterwards. In no case did the directors of any of the African subsidiaries sit round a table as a board, and they never either took any decision as a board, met as a board, or were summoned to meet as a board.

At all material times the boards of directors of the African subsidiaries did not and for all practical purposes could not manage and control the businesses of their respective companies. If they had tried to manage and control their companies' businesses (otherwise than in accordance with instructions from the directors of Alfred Booth & Co. Ltd.) Alfred Booth & Co. Ltd. would have removed them from office.

At all material times the whole of the trading policy of the African subsidiaries was dictated by the board of directors of Alfred Booth & Co. Ltd. and was implemented by Meinertzhagen as their senior representative and chairman of the African subsidiaries. Meinertzhagen was, however, consulted on occasions before a decision was taken, and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. He made two visits to London in 1952 and 1953, having been summoned to attend discussions with the directors of Alfred Booth & Co. Ltd. on various aspects of the affairs of the African subsidiaries. There were also occasions when a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

Article 145 of the Kenya Companies Ordinance provides that every company shall keep at its registered office a register of its directors or managers, and provides for the case of registration of a corporation as a director or manager. Subparagraph (6) thereof provides that " . . . a person in accordance with whose " directions or instructions the directors of a company are " accustomed to act shall be deemed to be a director and officer " of the company." At no time was the name of Alfred Booth & Co. Ltd. or of any director of that company included in the register of directors of any of the African subsidiaries.

At all material times every aspect of the businesses carried on by the African subsidiaries was under scrutiny by the executive directors of Alfred Booth & Co. Ltd. at their weekly meetings in London.

The commissioners found (as a conclusion of fact from a great deal of detailed evidence before them) that the aim of the directors of Alfred Booth & Co. was to have a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African undertakings, which could be relied on to implement their own policy decisions without the necessity of frequent visits to Africa by themselves. In 1952 and 1953, the day-to-day management of the undertakings was broadly supervised by Meinertzhagen, who was responsible for local (East African) management within the instructions and limitations (financial and otherwise) imposed upon him by the directors of Alfred Booth & Co. Ltd.; the work involved imposed too great a burden on him in view of the particular difficulties existing at that time and the fact that the undertakings were spread between Kampala and Mombasa. In particular, they were anxious to have a reliable "Number 2" to him who could act during his absence.

The mining venture, which was in form one of the activities of Booth & Co. (Africa) Ltd., was in fact almost entirely managed from London. J. W. Booth authorised the purchase of a claim on a visit to Nairobi; after certain initial steps had been taken, it was financed entirely by Alfred Booth & Co. Ltd. without recourse to the African subsidiaries' bankers; the decision to start mining was taken by the executive directors in London; they sent out an expert to advise and report on the mine, and they decided what the rate of production should be, how much labour should be employed and what vehicles should be used. The manager of the mine made reports from time to time direct to them, without going through the channel of Booth & Co. (Africa) Ltd.

The agreement with Hollander Hyams Ltd., under which Booth & Co. Ltd. disposed of most of its hides, was negotiated in London between Hollander Hyams Ltd. and Alfred Booth & Co. Ltd., as agents for Booth & Co. Ltd. In the day-to-day working of the agreement, Hollander Hyams Ltd. normally dealt directly with Booth & Co. Ltd.

In 1952 and 1953 it was part of the policy of the board of directors of Alfred Booth & Co. Ltd. to sell any of the assets or undertakings of the African subsidiaries if opportunity offered, and they supervised negotiations (mainly carried out on their instructions by Meinertzhagen in Africa) for selling the tannery and, on another occasion, the mine. These negotiations proved abortive.

Throughout the material period the staff and officials of the African subsidiaries were making decisions concerning the day-to-day running of the trading activities of the African subsidiaries, within the general policy directions of Alfred Booth & Co. Ltd.

The United Kingdom subsidiaries of Alfred Booth & Co. Ltd. were managed by the parent company in the same way as the African subsidiaries. The company also had two subsidiaries in the United States of America which, however, were not subject to the same detailed control.

It was contended on behalf of Unit: (1) that each of the African subsidiaries was resident in the United Kingdom at all material times, within the meaning of section 20 (9) of the Finance

Act, 1953; (2) that Unit was accordingly entitled to deduct the payments referred to above; and (3) that the assessments be reduced accordingly.

It was contended on behalf of the Crown: (1) that, as the African subsidiaries were admittedly resident in East Africa at all material times, they could not also at those times be resident in the United Kingdom; (2) that in any event none of the African subsidiaries was resident in the United Kingdom at any material time; and (3) that Unit was not entitled to the deductions claimed.

The commissioners who heard the appeal gave their decision as follows:

" We think, in addressing our minds to the question whether " the African subsidiaries were resident in the United Kingdom " in the material period, that the first question we have to " consider is what was the real situation regarding their manage- " ment and control.

" A number of (what have been described as) the acts of " interference in their management by the directors of Alfred " Booth & Co. Ltd. are equivocal, being equally well explained " as acts of parental or group control, or as the taking over of the " reins of management; others again are equivocal, being equally " well explained as the financial control of a creditor, or as the " taking over of the reins of management. . . .

" We find that the position was at the material times that the " boards of directors of the African subsidiaries (who are the " people one would have expected to find exercising control and " management) were standing aside in all matters of real import- " ance and in many matters of minor importance affecting the " central management and control, and we find that the real " control and management was being exercised by the board of " directors of Alfred Booth & Co. Ltd. in London.

" But it was contended on the part of the Crown that that " finding would not be enough to conclude the question before us; " it was said that there must be something more, that is, that " before we could find that the African subsidiaries were resident " in the United Kingdom, we must find control exercised here " under the constitution of the company concerned, by those " officers to whom such constitution gives it; in other words, the " Crown contended that we must find some ' formal ' control and " management here. We have considered this contention very " carefully and have come to the conclusion that the authorities " cited to us do not constrain us to accept it nor do they point "very strongly to the conclusion that it is right. On the contrary, "we notice that Lord Loreburn L.C. in his judgment in *De Beers* "*Consolidated Mines Ltd.* v. *Howe* [3] directs attention to 'where "'the central management and control actually abides,' and we "think it would be consistent with Lord Loreburn's reasoning to "stress the word 'actually.' In the course of the arguments "before us both sides relied on the remarks of Evershed M.R. in "*Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[4] and "in particular on his reference to 'where the controlling power "'and authority which, according to the ordinary constitution of "'a limited liability company, is vested in its board of directors, "'and the exercise of that power and authority, is to some sub-"'stantial degree to be found.' [5] In the appeal before us, we find "the controlling power and authority, which according to the "constitution of each of the African subsidiaries is vested in its "board of directors, is actually exercised, to a very substantial "degree, by the board of Alfred Booth & Co. Ltd. in London. "We hold, on our understanding of the authorities, that once we "have found that as a fact, it is not necessary to go further and "inquire whether such power and authority is exercised under the "constitution of the company concerned by the officers to whom "such constitution gives it.

"For these reasons we find, and so far as it is a matter of law "we hold, that each of the African subsidiaries was resident in "the United Kingdom in 1952 and 1953. We do not think that we "are precluded from coming to this conclusion by reason of the "admitted fact that the African subsidiaries were at the material "times resident in East Africa, having regard to the judgment "of the Master of the Rolls in *Union Corporation Ltd.* v. *Inland* "*Revenue Commissioners*.[6]"

The points of law for the opinion of the court were: (1) whether there was evidence upon which the commissioners could arrive at their findings of fact; and (2) whether their conclusions were wrong in law.

Wynn-Parry J. reversed the decision of the commissioners and decided that the subsidiaries were not resident in the United Kingdom within section 20 (9) of the Finance Act, 1953. Unit appealed.

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[3] [1906] A.C. 455, 458; 5 T.C. 198.

[4] (1951–53) 34 T.C. 207, 271; [1952] 1 T.L.R. 651; [1952] W.N. 119; [1952] 1 All E.R. 646.

[5] 34 T.C. 207.

[6] Ibid.

Heyworth Talbot Q.C. and *J. Creese* for the taxpayer, Unit Construction Co. Ltd. This case involves applying to unusual facts the well-established principle stated concisely by Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe.*[7] It is not uncommon to find a parent company directing at all points, but in the ordinary case where the board of the subsidiary adopts the recommendations of the parent, the acts done may be truly the acts of the subsidiary because the board will have considered the matter and decided to adopt the directions, perhaps because the directors might lose their jobs if they disobeyed or perhaps because they considered that the directions were sound. In the present unusual case there was not even the semblance of direction by the directors of the subsidiary and, as the boards did not meet, they could not have adopted the parent's instructions. There may have been misfeasance by the directors in not doing what they were appointed to do by the constitutions of the subsidiary companies. The issue is whether regard should be had to where the control "actually" was in fact, or whether only the control exercisable within the framework of the constitution is relevant.

[ROMER L.J. The parent company was wholly overruling article 67 of Table A in the First Schedule to the Companies Ordinance of Kenya, 1933.[8]]

Admittedly, Lord Loreburn L.C. probably did not have this type of case in mind, but neither did the Court of Appeal in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*[9] in referring to control "according to the ordinary constitution of "a limited liability company."

[JENKINS L.J. If a parent company takes the reins of government into its hands, does that change the residence of a subsidiary?]

Until the change takes place, presumably the directors would be meeting as a board and, therefore, there would necessarily be a decision by the subsidiary, either expressed or implied, to accept the parent's instructions. The test for residence is not made, as the Crown submit, by reference to the location of the board of directors, but to the location of the control and management by the person or body really carrying on the business. There might, for example, be a company whose directors were resident personally in different countries and they might never meet as a board (so that the test propounded by the Crown could not be applied), but yet, if the company was run at all, it must be run by somebody. Mere power in a parent company to override the constitution of its subsidiary would not per se fix the residence of that subsidiary. But if in fact the parent exercises control, that fixes the residence. It is difficult to give any other meaning to Lord Loreburn L.C.'s use of "actually abides,"[10] which would have been otiose if one has only to look at the form. He had just rejected Mr. Cohen's submission that the residence of a company might be determined by the registered address. In other contexts, residence might be where the products of the company are made, or where the board of directors meets and issues directions, but for present purposes it is where the "brain" of the company is: see *per* Hamilton J. in *American Thread Co. Ltd.* v. *Joyce*[11] and *per* Lord Halsbury.[12]

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[7] [1906] A.C. 455, 458.

[8] Article 67 of Table A of the First Schedule to the Companies Ordinance of Kenya, 1933, was incorporated in the articles of association of each of the subsidiaries and provided (so far as material) that "the business of the "company shall be managed by the "directors, who may . . . exercise all "such powers of the company as are "not, by the Ordinance, or by these "articles, required to be exercised by "the company in general meeting."

[9] 34 T.C. 207.

[ROMER L.J. If that is so, the residence may vary from time to time, and the special commissioners would have to inquire, in relation to any year of assessment, what degree of self-government had been permitted to the subsidiary.]

Gramophone and Typewriter Ltd. v. *Stanley*[13] is distinguishable. That was a decision that the parent of a wholly-owned subsidiary was not, by virtue of the shareholding, necessarily exercising control and management. The issue was not as to the residence of the German company, but whether it was a genuine subsidiary or a mere simulacrum of the English company. It is not suggested that the relevant central management and control abides in a parent company merely because it owns the whole of the shares of the subsidiary, or because it has power to dismiss or appoint the directors of the subsidiary, or because (whether for the latter reason or any other) there are grounds for thinking that the parent company's directions will be obeyed. *Swedish Central Railway Co. Ltd.* v. *Thompson*[14] decided that a company could be resident in more than one place at the same time, but it was not doubted that the company was resident where the central control and management were actually found.

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[10] [1906] A.C. 455, 458.

[11] (1911–12) 6 T.C. 1, 16; 28 T.L.R. 233.

[12] 6 T.C. 1, 164.

[13] [1908] 2 K.B. 89; 5 T.C. 358.

[14] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

In *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*[15] the only things done in the United Kingdom were the minimum requirements to comply with English company law. [Reference was made to *Salomon & Co. Ltd.* v. *Salomon.*[16]]

In a group structure it is common for the members of the board of the subsidiary not to be members of the board of the parent company. The usual form of the organisation of the group is that the parent holds the shares in the subsidiary and by virtue of shareholding has the power of appointment and dismissal of directors, but how far it actually controls and manages the affairs of the subsidiary is a matter of fact. Often the object of the group structure is to get the benefit of specialist functions, and that purpose is achieved by appointing to the boards of the subsidiary company the leading figures in the particular businesses. In *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.*[17] the directors of the German company were no longer capable of functioning because they were enemy aliens, and it may be that that was the reason for concluding that they were not directing minds. In *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*[18] Viscount Sumner referred to where on the facts the company's business is " directed " and carried on, but the possibility that the direction might be de facto in persons not de jure directors may not have been present to his mind. None of the authorities gives any support to a construction which involves reading in words to the effect that the relevant test is de jure control and management.

If the Crown is right it will be easy for a company to escape tax on the profits of its foreign subsidiary. All that is necessary is to provide by the constitution of the subsidiary that the management and control shall be in the directors of that company. The common sense construction, and one which is supported by the authorities, is to consider what is in fact done, who is in fact running the business.

There are four propositions. First, that the power of the shareholders as such does not invest them with control of the company's business. Second, in the case of a wholly-owned subsidiary, although the parent is in a position to exercise de facto control, that is not conclusive. Third, whether or not the parent company assumes and exercises de facto the management and control of the subsidiary company is a question of fact. Evershed

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[15] [1929] A.C. 1; 44 T.L.R. 747; 14 T.C. 119.

[16] [1897] A.C. 22.

[17] [1916] 2 A.C. 307; 32 T.L.R. 624.

[18] [1929] A.C. 1, 26.

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M.R. in *Union Corporation Co. Ltd.* v. *Inland Revenue Commissioners* [19] was not saying by whom the authority must be exercised to come within Lord Loreburn L.C.'s test, but he was describing the kind of control which was relevant, that is, not the ultimate control of the shareholder but the kind which is normally vested in a board of directors.

[ROMER L.J. What was the basis for the admission made before the commissioners that the companies were resident in Africa?]

It was apparently thought at one time that some measure of control was exercised by the Kenya directors. It may also have been thought that the presence of Meinertzhagen in Kenya invested the companies with residence there. Now that all the facts are known it is open to doubt whether the admission should have been made, but it is not sought to resile from it; it is not fatal. On the facts as now known, the exercise of authority was only by the London board. Nothing in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [20] indicated that the parent company was conducting the affairs of the subsidiary by virtue of something enjoyed within the framework of the constitution of the subsidiary company. It was held that the subsidiary was not in fact independent because the parent company had power to appoint nominee directors through whom it could achieve its will.

J. Creese followed.

Roy Borneman Q.C., *Alan S. Orr* and *J. R. Phillips* for the Crown. Lord Loreburn L.C.'s test is accepted and alleged, but the difficulty is to apply it. Central management and control of a company cannot abide outside its board of directors either actually or otherwise. The company is a persona ficta and, therefore, it has to be " clothed " by law. It cannot exist outside the law but must be within the statute, that is normally the Companies Act, and within its articles, as permitted by the law. This company is seeking to rely on its own irregularities. But the backdrop against which the judicial words are displayed is that everything done by the company must be within the law. The question is not whether Lord Loreburn L.C. had this situation in mind; still less whether he was trying to cover everything which could arise in every case. No reported case deals with circumstances where the acts done were in conflict with the law, and in none of the authorities is there any suggestion that one can go outside the rules set up by law for the government of the persona ficta. If the company is right, certainty goes and chaos walks in, for the residence of the company may change daily, according to the way in which the company conducts its affairs. The subsidiaries have put themselves in this difficulty. They were at pains to show originally that they were not resident in the United Kingdom so as not to be liable for United Kingdom tax on their profits. But when it was found that they were not making profits, it became desirable that they should be resident in the United Kingdom so that relief could be obtained on the losses. No doubt if profits were made, the de facto position would rapidly change and it would then be submitted that the companies were resident in Kenya. It is difficult to find that control abides where the law says it does not.

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[19] 34 T.C. 207, 271.

[20] [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66.

The first proposition of Mr. Heyworth Talbot was *Gramophone and Typewriter Ltd.* v. *Stanley*[21] and is not disputed. The second turned on what is meant by a wholly-owned subsidiary. It was submitted that a wholly-owned subsidiary meant that the parent company owned all the shares and was in a position to assume the exercise of shareholder's control. If so, that proposition is in conflict with *Stanley's* case[21] and cannot stand. It also conflicts with *Kodak Ltd.* v. *Clark.*[22] *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*[23] is distinguishable. It was a decision on a particular section of the Companies Act dealing with the oppression of minorities. As Dixon J. said in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioners of Taxation,*[24] residence is where the " superior and directing authority " is found. " Authority " does not include a right which one can enforce but which is not within the law, and the " superior or " directing authority " cannot be found where it is not permissible. It is not permissible for the directors of one company to control another if they are not the directors of that other company. The subsidiary companies in Kenya cannot be heard to allege that their directors do not manage and control them and that the central management and control is by some other company or person. In *Union Corporation Ltd.* v. *Inland Revenue Commissioners*[25] Evershed M.R. said unequivocally that the directors of the company concerned were the paramount authority; his

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[21] [1908] 2 K.B. 89.

[22] [1903] 1 K.B. 505; 4 T.C. 549.

[23] [1958] 3 W.L.R. 404.

[24] (1940) 64 C.L.R. 15.

[25] 34 T.C. 207.

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dictum [26] has always been understood in the way Wynn-Parry J. read it, and that construction accords with common sense and prevents chaos.

The taxpayer cannot resile from the admission made before the commissioners that the companies were resident in Kenya. It is not disputed that a company can be resident in more than one place (*Swedish Central Railway Co. Ltd.* v. *Thompson* [27]), but it is not an easy concept and is not readily accepted. The burden on a company which seeks to say that it has dual residence is heavy. It has to show that part of the superior and directing authority (that is, the authority properly and regularly exercised within the law) is in both places. In the present case, to satisfy Dixon J.'s test, the company must show that substantial business operations were carried out in the United Kingdom, which is not true as a matter of fact.

It is plain that these companies were in fact resident in Kenya. It was certainly never intended that they should be resident in the United Kingdom, and it was intended that they should be resident in Kenya. They were "fitted out" as companies solely resident in Kenya. They were formed under the Ordinance of 1933, which is relevant only in Kenya. Provision could have been made for directors of the parent company to take a hand in the management of the company, but that was carefully avoided because it might have involved liability to United Kingdom tax. Care was taken to see that the company was to be controlled by the directors. Article 67 could have been avoided by using a common form, but that was not done. It was specifically provided that directors' meetings were not to be held anywhere except in Kenya, making it plain that the companies were resident solely in Kenya. The directors were not to act in the United Kingdom. None of the companies did anything in the United Kingdom. The managing director, Meinertzhagen, the chairman of the African companies, was not a member of the English board and he cannot be heard to say that he acted otherwise than as chairman of the African boards. The only control over him which the parent company had was the control as shareholders holding the ultimate sanction of dismissal if he disobeyed their directions. He was only vested with power to act as a member of the African boards. It is vitally significant that he was consulted by the parent company before that company decided what to do in Kenya. It is said that the minutes were written up according to recollections, but that is incorrect. They were transcriptions of contemporary records. The companies cannot say that no notice should be taken of their own minute books. They were put forward to the world as the minutes and the companies cannot impugn their accuracy or genuineness. They indicate that the companies did operate substantially in Kenya.

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[26] 34 T.C. 207, 271.

[27] [1925] A.C. 495.

Heyworth Talbot Q.C. in reply. Both constructions may result in chaos and uncertainty. The Crown's view involves the greater danger because of the ease of tax evasion. For example, a company may have half its directors in the United Kingdom and half abroad, but sufficient according to its articles to give a quorum in either place. All the directors would have equal powers and all would be amenable to the directions of the board. When it suited the company to reside in the United Kingdom, there would be a quorum there and only those directors who were there would attend the meetings; and when residence in Kenya was desired, only those resident there would attend. The resolutions would all be within the framework of the constitution. A vital part of the test of residence is, as was said in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[28] where the power and authority is "exercised," and the commissioners found no exercise whatever of the powers vested in the Kenya boards. Mr. Borneman submitted that there was no evidence of business operations in the United Kingdom, but that is incorrect. According to the case stated, contracts for the sale of the products were negotiated in the United Kingdom. It is a question of fact whether those operations were substantial or not, and there is no finding either way. In my second proposition, which Mr. Borneman attacked, it was not said that the parent company had de jure control, but merely that if the parent company held all the share capital of a subsidiary it was in possession of powers which enabled it to exercise de facto control.

Cur. adv. vult.

February 12. Jenkins L.J. The judgment which is about to be read by Romer L.J. is the judgment of the court.

Romer L.J. The question on this appeal is whether three wholly owned subsidiary companies of Alfred Booth & Co. Ltd., namely, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. (hereinafter collectively referred to as "the

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[28] 34 T.C. 207.

"subsidiaries"), were, in 1952 and 1953, resident in the United Kingdom for the purposes of section 20 of the Finance Act, 1953. The special commissioners held that they were, but their decision was reversed by Wynn-Parry J. on the ground that it was wrong in law. The Unit Construction Co. Ltd., who are concerned to uphold the decision of the special commissioners, have appealed to this court against the judge's order.

It was admitted on behalf of the Unit Construction Co. Ltd. before the commissioners that the subsidiaries were at all material times resident in East Africa. We think it is quite clear that this submission was rightly made; and as every possible step was taken, when the subsidiaries were incorporated in 1948 and 1949, to ensure beyond possibility of doubt that their residence should be regarded as being in East Africa, and as their articles of association were never altered, it would have been virtually impossible for the Unit Construction Co. to have contended to the contrary. As the judge observed in his judgment[1]: "Not "only were all those companies registered in East Africa but they "carried on business there; the members of the respective boards "were resident there; and the articles of association provided in "each case that the board meetings and general meetings of the "company concerned could be held anywhere except in the "United Kingdom."

The fact that in 1952 and 1953 the subsidiaries were resident in East Africa is naturally somewhat embarrassing to the contention that in those years they were resident in the United Kingdom. It is not, however, in any way destructive of that contention because ever since the decision of the House of Lords in *Swedish Central Railway Co. Ltd.* v. *Thompson*,[2] it has been well established that, for income tax purposes, a company can simultaneously have two "residences" in different countries. The view of the special commissioners that during the relevant period the subsidiaries could properly be regarded as resident in the United Kingdom as well as in East Africa was based upon their finding that each of these companies was controlled and managed by the parent company, Alfred Booth & Co. Ltd., which is incorporated and resident in England. "We find," the commissioners say in the stated case, "that the position was at the "material times that the boards of directors of the African sub- "sidiaries (who are the people one would have expected to find

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[1] Ante 147; [1958] 3 W.L.R. 504, 513; [1958] 3 All E.R. 186.

[2] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

" exercising control and management) were standing aside in all " matters of real importance and in many matters of minor " importance affecting the central management and control, and " we find that the real control and management was being " exercised by the board of directors of Alfred Booth & Co. Ltd. " in London. . . . We find the controlling power and authority, " which according to the constitution of each of the African " subsidiaries is vested in its board of directors, is actually " exercised, to a very substantial degree, by the board of Alfred " Booth & Co. Ltd. in London." The reasons for these findings, and the facts on which they are based, are stated with great care and clarity in the case, and there is no doubt but that the findings are fully warranted. The only question before the judge, as it is before us, was whether those findings justified the commissioners' conclusion in law that the subsidiaries had a residence in the United Kingdom. Having found as a fact that the controlling power and authority over the subsidiaries was actually exercised by the parent company in London the commissioners held, on their understanding of the authorities, that " it is not " necessary to go further and inquire whether such power and " authority is exercised under the constitution of the company " concerned by the officers to whom such constitution gives it." It is upon that issue of law that the judge differed from the special commissioners, and it is that issue which has been brought to this court for decision.

The question, in its briefest form, may be illustrated and posed as follows: Company A, resident in one country, is de facto, but not de jure, managed and controlled by company B, which is resident in another. Is a dual residence to be attributed to company A by reason of this de facto management and control? The special commissioners in effect answered this question in the affirmative. The judge came to a different conclusion, and he expressed it in a judgment with which we so wholly agree that we would be content to adopt it as our own, both in its reasoning and in its language. Out of deference, however, to the arguments which were addressed to us by Mr. Heyworth Talbot and Mr. Creese for the taxpayer, we will state as shortly as possible in our own words the reasons why, as it seems to us, the appeal must fail.

Mr. Talbot submitted in support of his case the following three propositions: 1. The powers of shareholders as such do not invest them with the central management and control of the company's business. 2. But where a company is a wholly-owned subsidiary the powers of the parent company with regard to the dismissal of directors and the provision of finance upon which the conduct of the subsidiary's business may depend put the parent company in a position to assume and exercise de facto the management and control of the company's business. 3. Whether or not the parent company assumes an exercise de facto of the management and control of the subsidiary's business is a question of fact.

For our part we are prepared to accept each of these propositions as correct. The first of them is clearly established by the decision of the Court of Appeal in *Gramophone and Typewriter Ltd.* v. *Stanley.*[3] Wynn-Parry J. referred to this case in his judgment and cited extracts from the judgments of Sir Herbert Cozens-Hardy M.R. and of Buckley L.J. We need not repeat them, but would refer only to a few passages from the judgment of Fletcher-Moulton L.J., which are perhaps of equal interest and relevance.

"This legal proposition," said the Lord Justice,[4] "that the "legal corporator cannot be held to be wholly or partly carrying "on the business of the corporation is not weakened by the fact "that the extent of his interest in it entitles him to exercise "a greater or less amount of control over the manner in which "that business is carried on. Such control is inseparable from "his position as a corporator and is a wholly different thing both "in fact and in law from carrying on the business himself. The "directors and employees of the corporation are not his agents "and he has no power of giving directions to them which they "must obey . . . (The shareholders') course is to obtain the "requisite majority to remove the directors and put persons in "their place who agree to their policy. This shows that the "control of individual corporators is something wholly different "from the management of the business itself."

Fletcher-Moulton L.J. then proceeded to examine what he described as "a more difficult question," namely, the position which arises when one individual owns the whole of the shares in a corporation—which is permissible under German law, or was at all events permissible when *Stanley's* case[5] was recorded. He said[6]: "Treating it as an abstract proposition of law, I am "of opinion that the acquisition of the whole of the shares of a "corporation by one individual does not, of itself, alter the nature "of his relationship to the corporation. His de facto control

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[3] [1908] 2 K.B. 89; 5 T.C. 358.

[4] 5 T.C. 358, 376.

[5] Ibid. 358.

[6] Ibid. 377.

"when he possesses 98 per cent. is probably complete from a "practical point of view, and although it is, no doubt, rendered "more complete in theory when he possesses himself of the "whole of the shares, it is still of the nature of a control exer"cised by corporators over the corporation, and does not make "him and the corporation in any sense identical. The directors "of the corporation do not become his agents. Their duties are "still controlled by the rules and constitution of the corporation "itself. Nor is this consideration one of theoretical law only. "The fact that the whole of the shares of the corporation are "held by one individual at one moment by no means implies that "they will be so at a future time; and the responsibility of the "directors and officers of the corporation is to the corporation "itself, whatever be its composition at any moment as to the "number of corporators. It would be no excuse to them, when "called to account in the regular way and at the regular periods "according to the constitution of the corporation, to plead that "they obeyed the directions of the corporators at a particular "moment (unless given in the manner prescribed by the consti"tution of the corporation) and on the strength of such directions "failed to obey the corporate rules."

If, then, authority were required to establish Mr. Talbot's first proposition, one need go no further than *Stanley's* case[7] to find it. Mr. Talbot's third proposition is also correct; the question of de facto control, if it should be relevant in any case, must clearly be one of fact. Mr. Borneman, for the Crown, was inclined to dispute the validity of Mr. Talbot's second proposition on the ground that it was inconsistent with the judgments and decision in *Stanley's* case.[7] A study of those judgments shows, however, in our opinion, that there is no such inconsistency, for they recognise that a shareholder who holds sufficient shares in a company can de facto control its affairs by his ability to remove directors who disagree with his policy and to vote others into their places. The weakness of Mr. Talbot's second proposition, to our mind, is not that it is inconsistent with authority but that it is irrelevant to the issue which falls to be decided.

Mr. Talbot was certainly able to point to passages in the judgments of judges who decided previous cases as supporting, at first sight, the view that the place in which is to be found the actual management or control of the company's business determines the residence of the company.

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[7] 5 T.C. 358.

We will quote a few examples. In *De Beers Consolidated Mines Ltd.* v. *Howe* [8] Lord Loreburn L.C. accepted and enunciated the principle that [9] "a company resides, for the purposes "of income tax, where its real business is carried on . . . and "the real business is carried on where the central management "and control actually abides." Mr. Talbot naturally laid stress on the use by Lord Loreburn of the word "actually."

In *American Thread Co.* v. *Joyce* [10] Hamilton J., after referring to Lord Loreburn's test in the *De Beers* case,[11] said [12]: "This test, 'the real business is carried on where the central "'management and control actually abides,' does not differ to "my mind in substance from the tests mentioned in earlier cases, "such as 'the conduct and management, the head and brain of "'the trading adventure' in the *San Paulo* (*Brazilian*) *Railway Co.* v. *Carter*,[13] or the expression which has not been "uncommonly used by commissioners 'the head and seat and "'directing power of the affairs,' but owing to its being compact "and precise, it appears to me to be the convenient one for "adoption."

In the same case on appeal to the House of Lords Lord Halsbury said [14] that the real test "which, after all, is only a "question of analogy—you cannot talk about a company residing "anywhere—and that which has been accepted as a test, is "where what we should call the head office in popular language "is, and where the business of the company is really directed "and carried on in that sense." This exposition by Lord Halsbury of the test to be applied was referred to by Lord Sumner in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*,[15] and he said [16]: "This expression of opinion can only mean that for "both British and foreign companies alike the test is where on "the facts (including among all the others the fact of incorporation here or there) the company's business is really directed "and carried on."

Relying on such judicial utterances as these, and there are others to the like effect, Mr. Talbot contends that on the findings of the commissioners it is clear that the central management and control of the subsidiaries actually abides in London and it is from there that their business is really directed and carried on.

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[8] [1906] A.C. 455; 5 T.C. 198.

[9] [1906] A.C. 455, 458.

[10] (1911–12) 6 T.C. 1; 28 T.L.R. 233.

[11] [1906] A.C. 455.

[12] 6 T.C. 1.

[13] [1895] 1 Q.B. 580; 3 T.C. 344.

[14] 6 T.C. 1, 165.

[15] [1929] A.C. 1; 44 T.L.R. 747; 14 T.C. 119.

[16] 14 T.C. 119, 151.

Mr. Borneman, however, met this contention and, in our opinion, successfully met it, in two ways. First, he said that the scope and significance of judgments can only be truly assessed in the light of the facts of the particular cases in which they are delivered. This, of course, is undeniably true. All the judgments to which we have referred, and on which Mr. Talbot relied, were delivered in what we might call ordinary cases, and there is no reason at all to suppose that the judges had in mind such a case as the present in which de jure management is vested in one company whilst de facto control is vested in another. In none of the relevant authorities was so special a case referred to in argument or adverted to in the judgments. Judicial language is only authoritative in so far as it is directed to the particular subject-matter which is present to the speaker's mind; and, whatever its apparent width, it has no force, even persuasive, outside the limits of its intended application. Accordingly the passages from the various judgments and speeches to which we have referred and on which Mr. Talbot sought to rely do not, in our opinion, advance the taxpayer's case. The second point which Mr. Borneman took is, we think, equally well founded. He submitted that it is a legitimate assumption that, whatever judges may have said with regard to acts or other elements which may determine residence, such acts or elements were envisaged as being regular and not irregular, constitutionally lawful and not unlawful. We think this must prima facie be so and the relevance of the consideration arises very directly in relation to article 67 of Table A in the First Schedule to the Companies Ordinance of Kenya, 1933. This article, which was incorporated in the articles of association of each of the subsidiaries, provides (so far as material) that "the business of the company shall be "managed by the directors, who may . . . exercise all such "powers of the company as are not, by the Ordinance, or by these "articles, required to be exercised by the company in general "meeting." If, submitted Mr. Borneman, and as the special commissioners have found, the business of the company was in fact being managed by the parent company and not by the subsidiaries' own directors, the provisions of article 67 were being wholly disregarded; and an act such as that, the flouting of a term of a subsidiary company's constitution, can never have been judicially contemplated as being a guide to the residence of that company. In other words, says Mr. Borneman, where the judges have referred to the place where the central management and control is to be found, they mean the constitutional management

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and control and nothing else. As we say, we accept that submission, and the result of accepting it is that, inasmuch as under the constitutions of the subsidiaries their management and control was vested in their directors in Kenya and in them alone, there is no warrant in the authorities for attributing to the subsidiaries a second residence in England by reason of the usurpation of the directing power by the parent company. The conclusion that only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company seemed to the judge, as it seems also to us, to be strongly borne out by the judgment of this court in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*.[17] In the course of that judgment there appears the following passage, which Wynn-Parry J. cited [18]: " 'The company may be properly found to reside in " 'a country where it "really does business," that is to say " 'where the controlling power and authority which, according " 'to the ordinary constitution of a limited liability company, is " 'vested in its board of directors, and the exercise of that " 'power and authority, is to some substantial degree to be " 'found.' "

Evershed M.R., who read the judgment of the court, then referred to a passage from the judgment of Sir Owen Dixon in the Australian case of *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioners of Taxation*.[19] This passage is also cited by the judge, and so we will not repeat it. We will, however, refer to the judge's conclusion [20] on the matter, with which we respectfully and entirely agree: "In my view this passage is "conclusive of the question before me. In the first place, the "words of the Master of the Rolls, 'that is to say, where the " 'controlling power and authority which, according to the " 'ordinary constitution of a limited liability company is vested " 'in its board of directors, and the exercise of that power and " 'authority is to some substantial degree to be found,' indicate "to my mind that he was contemplating only an exercise of "authority which could properly be exercised within the framework of the constitution of the company concerned. This "conclusion is, I think, inevitable when one considers the phrase "used by Dixon J., 'the superior or directing authority.' In "that context 'authority' must have a narrower meaning than

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[17] (1951–53) 34 T.C. 207; [1952] 1 T.L.R. 651; [1952] W.N. 119; [1952] 1 All E.R. 646.

[18] 34 T.C. 207, 271; [1958] 3 W.L.R. 504, 517.

[19] (1940) 64 C.L.R. 15.

[20] [1958] 3 W.L.R. 504, 517.

" 'power.' It must connote something which has been regularly " established, and because of that regular establishment is " entitled and able to exercise direction. To my mind, the board " of the parent company cannot fall within the phrase 'superior " 'or directing authority.' As such it has no authority over the " boards of the African subsidiaries. True those boards may " accept the instructions of the board of the parent company; but " they are not bound to do so. It may be that they do accept " instructions, because failure to do so would result in dismissal, " but acceptance in fact of such instructions does not mean that " the board of the parent company have authority to give the " instructions. As I have said, they have no such authority. It " must follow, to my mind, that in applying the test adumbrated " by the Master of the Rolls no weight or attention can be given " to the activities of the board of the parent company in relation " to Unit and the African subsidiaries for the purpose of con-" sidering whether or not any of them are resident in the United " Kingdom. In the result it cannot be said that any part of the " superior and directing authority of these companies can be said " to exist in the place claimed as a residence, namely, the United " Kingdom. Further, even if 'authority' could be regarded as " being synonymous with 'power,' the word 'power' in the " context would have to be read as 'power regularly exercised.' "

We should perhaps make a brief reference to two cases upon which Mr. Talbot and Mr. Creese respectively placed some reliance. The first was *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*.[21] In that case a company formed a subsidiary and caused its own nominees to be appointed on to the board of directors. These nominees exercised their powers in the interests of the parent company and to the detriment of the subsidiary to such an extent that the latter's business came virtually to a standstill. Some minority shareholders accordingly presented a petition under the Companies Act, 1948, s. 210, for an order on the parent company to purchase their shares. The House of Lords held they were entitled to the relief sought and that, to quote from the headnote, the parent company "had acted " towards the minority shareholders of the (subsidiary) company " in an oppressive manner and that this conduct through the " nominee directors of the company, who were also directors of " the society, amounted to conduct of the affairs of the company, " since the transactions of the two could not be separated." We do not think that that case is of any assistance. It shows that de facto control of a company's business from outside can constitute an oppressive conduct of its affairs for the purposes of section 210, but that is far removed from showing that such control can affect the company's "residence." The second case was *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*[22] In that case one of the questions in debate was, in substance, whether a company which was incorporated in England but whose shareholders (save one) and directors were Germans resident in Germany could sue in this country in time of war between the two countries. Lord Parker of Waddington, with the concurrence of other of the Law Lords, expressed the view that (to quote again from the headnote) "the character of "individual shareholders cannot of itself affect the character of the "company; but the enemy character of individual shareholders "and their conduct may be material on the question whether the "company's agents or the persons de facto in control of its affairs "are in fact adhering to, taking instructions from, or acting under "the control of enemies." We cannot ourselves see how that view, or any of the speeches of their Lordships in that case, have any bearing on the effect on the residence of a company of its business being carried on under extraneous control. The only matter which their Lordships were discussing was the extent to which the character of an English company (British on the one hand or enemy on the other) should be determined by the character of those who de facto controlled its affairs.

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[21] [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66.

It only remains to say that for the reasons which we have explained, and which are in substance the same as those expressed in the judge's judgment, this appeal, in our opinion, fails and must be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

E. D.

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[22] [1916] 2 A.C. 307; 32 T.L.R. 624.

BARCLAYS BANK LTD. *v.* INLAND REVENUE COMMISSIONERS.

1958
Dec. 5, 9, 17.

Danckwerts J.

[1958 B. 3270.]

Revenue — Estate duty — Valuation — Shares — Control of company — Shares held by deceased beneficially—Further shares held as trustee —Whether register of members conclusive—Whether deceased in control of company—Method of valuation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55 (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company — Control — Estate duty purposes — Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55.

Meaning of "deemed"—Humpty Dumpty.

At the date of his death on December 15, 1955, the deceased owned beneficially 1,100 shares in a company. By a settlement made on December 1, 1936, he had settled 3,650 shares in the same company upon trust for his wife and children, he himself taking no benefit. The deceased had always been a trustee of the settlement. His name appeared as the first of the four trustees' names in the company register, and since Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the company's articles of association, it was he who exercised the powers of voting.[1] The issued share capital of the company had always been 8,350 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital.

The trustees took out a summons to determine whether the deceased had control of the company within the meaning of section 55 of the Finance Act, 1940,[2] in which event the 1,100 shares

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

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[1] Companies (Consolidation) Act, 1908, Table A:—Art. 60: " . . . On "a poll every member shall have one "vote for each share of which he is "the holder."

Art. 61: "In the case of joint "holders the vote of the senior who "tenders a vote, whether in person "or by proxy, shall be accepted to the "exclusion of the votes of the other "joint holders; and for this purpose "seniority shall be determined by the "order in which the names stand in "the register of members."

[2] Finance Act, 1940, s. 55, as amended: "(1) Where for the pur"poses of estate duty there pass, on "the death of a person dying after "the commencement of this Act, "shares in or debentures of a com"pany to which this section applies, "then if (*a*) the deceased had the "control of the company at any time "during the five years ending with "his death . . . the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of section 7 "(5) of the Finance Act, 1894, "shall be estimated by reference "to the net value of the assets "of the company in accordance with "the provisions of the next succeed"ing subsection. . . . (3) For the

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should be valued for estate duty by reference to their assets value in accordance with section 55 (2), or, whether they should be valued by reference to their market value under section 7 (5) of the Finance Act, 1894:—

Held, (1) that under section 55 (5) of the Act of 1940 it was necessary to investigate the true position of a registered holder to see whether he was in fact a trustee or in some other fiduciary capacity in respect of someone else, so that the rule laid down in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.* (infra) that the company and the court could not look beyond the register did not apply.

(2) That in the present case such investigation showed that the deceased could not exercise his vote freely but was bound to act on the unanimous decision of the four registered trustee shareholders.

(3) That having regard only to subsection (1) of section 55, without recourse to subsection (3), the deceased had not "the control "of the company" as opposed to "a controlling interest in" the company within the meaning of the authorities; nor had he "the control of powers of voting on all questions . . ." within the meaning of subsection (3) (*a*).

(4) That, accordingly, the deceased did not have control of the company within the meaning of section 55, and the shares should be valued under section 7 (5) of the Act of 1894.

Inland Revenue Commissioners v. *J. Bibby & Sons Ltd.* (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167 and *Inland Revenue Commissioners* v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491 distinguished.

British American Tobacco Co. Ltd. v. *Inland Revenue Commissioners* [1943] A.C. 335; [1943] 1 All E.R. 13; 29 T.C. 49 and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612 considered.

ADJOURNED SUMMONS.

The deceased, Tom Shipside, died on December 15, 1955, having, by his will dated December 18, 1952, appointed the plaintiffs to be his executors and trustees. Probate was granted to them on March 24, 1956. The estate of the deceased

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"purposes of this section a person "shall be deemed to have had control "of a company at any time if he "then had (*a*) the control of powers "of voting on all questions, or on "any particular question, affecting "the company as a whole which if "exercised would have yielded a "majority of the votes capable of "being exercised thereon . . . or if "he could have obtained such control . . . by an exercise at that "time of a power exercisable by him "or with his consent. . . . (5) Control of a company which a person "had in a fiduciary capacity shall be "disregarded for the purposes of this "section. . . ."

S. 58 (5): "References in this Part "of this Act to a person having any "power or control or doing any act in "a fiduciary capacity shall be construed as references to his having "that power or control or doing that "act in a fiduciary capacity imposed "on him otherwise than by a disposition made by him and in such "a capacity only."

included at his death 1,100 fully paid ordinary £1 shares in T. Shipside Ltd. registered in the sole name of the deceased, and these shares he owned beneficially. By a settlement dated December 1, 1936, the deceased settled 3,650 fully paid ordinary £1 shares in the company upon trust for the benefit of his wife and his children, he himself taking no beneficial interest. The deceased and two other persons were the original trustees, but as a result of appointment made on November 30, 1948, when one of the original trustees retired, the deceased and three other persons became the trustees and remained so until the deceased's death. The 3,650 shares were registered in the company's register of members in the names of the four trustees, the name of the deceased appearing as the first holder. The company had been incorporated under the Companies Acts, 1908 to 1917, and Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the articles of association. The deceased was therefore the person with the right to exercise the votes.

The issued share capital of the company had always been 8,350 ordinary £1 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital. It being uncertain whether the deceased had control of the company so as to affect the valuation of the 1,100 shares for estate duty, the plaintiffs took out a summons to determine whether, upon the true construction of section 55 of the Finance Act, 1940, the principal value of the 1,100 shares should be estimated in accordance with the provisions of section 55 (2) of the Act of 1940, or in accordance with section 7 (4) of the Finance Act, 1894. If the former method, which required the value of the shares to be estimated by reference to the net value of the company's shares, were adopted, the burden of estate duty would be higher than if the valuation were made under section 7 (5) of the Act of 1894, which provided for a valuation by reference to the market value of the shares.

B. L. Bathurst Q.C. and *Denys B. Buckley* for the plaintiffs. The mere fact that the deceased's name appeared as the first holder in the company's register and that he was, therefore, the person to exercise the votes in respect of the trust shares is not sufficient to make him bring those shares into account for determining whether he had control of the company. As a matter of trust law the deceased's powers as a trustee were the same as those of the other trustees. The decision of trustees must be unanimous; a vote cast in respect of the trust shares was the unanimous vote of the deceased and his co-trustees. Thus, the deceased was never in a position freely to exercise a vote, and therefore he did not have de facto control within the meaning of section 55 (3) (*a*) of the Finance Act, 1940. Section 55 (1) (*a*) and section 55 (3) are not mutually exclusive: section 55 (3) defines " control " for the purpose of section 55 (1) (*a*). To come within section 55 (3) (*a*) it is necessary to have a majority of votes one can control, as opposed to votes exercised in one's own right. Even if section 55 (1) (*a*) is looked at in vacuo, " control " must mean that an individual can exercise the votes as he thinks fit.

This case is distinguishable from *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*,[3] which was concerned with the " controlling interest " of three directors, all of whom were on the register, for the purposes of excess profits tax. *Inland Revenue Commissioners* v. *Silverts Ltd.*[4] and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [5] show that the ratio decidendi of *Bibby's* case [6] was that the right of members in relation to the company, when dealing with liability to profits tax and excess profits tax, must be determined by reference only to the share register, beyond which it is not generally permissible to look. Those cases have no application to questions relating to estate duty under section 55 of the Finance Act, 1940, where the question is " who controls the company."

John Pennycuick Q.C. and *E. Blanshard Stamp* for the defendants. Section 55 (3) is a " deeming " subsection; it provides that " control " of the company shall be treated as existing in the circumstances there described, and it is thus an extension of " control " in section 55 (1) (*a*): on " deeming," see *In re Parsons* [7] and *St. Aubyn* v. *Attorney-General.*[8] The effect of subsections (1) (*a*) and (3) read together is that one considers " control of the company " in subsection (1) (*a*) according to its ordinary meaning, and then subsection (3) extends that meaning by providing that whether or not the deceased had " control " within subsection (1) (*a*) he is deemed to have control if he had (*a*) " the control of powers of voting," and (*b*) the capacity to exercise certain powers. "Own," and not "control," is the word generally used in relation to one's own shares. The deceased had this control and the case is covered by the *Bibby*[9] and *Silverts*[10] cases. In those cases the court considered the meaning of "controlling interest" and not "control," but there is no difference between them, apart from the qualification in section 55 (5), for present purposes. "Control" carries no implication of beneficial control without express words.

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[3] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[4] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

[5] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612.

[6] 29 T.C. 167.

[7] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

[8] [1952] A.C. 15; [1951] 2 All E.R. 473.

The plaintiffs must show that the four trustees are the persons to be regarded in order to see who is entitled to exercise the votes; they are unable to do this as article 61 of Table A and the register show conclusively that the deceased was entitled to exercise the votes: *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*,[11] *F. A. Clark & Son Ltd.* v. *Inland Revenue Commissioners*[12] and the *Berendsen* case.[13] It is in accordance with the *Bibby* case[14] and with dicta in *Silverts'* case[15] to look at the first name on the register.

[DANCKWERTS J. Why cannot you look beyond the register and say that the deceased was bound to exercise his vote as he was told?]

If the voice heard by the company was that of the deceased, and not that of the other trustees, the principle of *Bibby's* case[16] is applicable.

Bathurst Q.C. in reply. The sole question in *Bibby's* case[16] was whether the company was one in which the directors had a controlling interest, and it was held that "controlling interest" did not refer to any beneficial interest. The *Silverts*[17] and *Berendsen*[18] cases were concerned with profits tax—a tax on companies—and in them the Court of Appeal said, first, that one cannot go behind the share register, and, secondly, one must consider whose voice is heard when a vote is cast. The voice which is heard when one of several trustees casts a vote in respect of the trust shares is the unanimous vote of all the trustees. If they fail to agree, that voice is either silent or is controlled by an order of the court.

An assets valuation might result not only in placing a higher value on shares but also in increasing the rate of estate duty on the remainder of the estate as a matter of aggregation.

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[9] 29 T.C. 167.
[10] 29 T.C. 491.
[11] (1950) 29 T.C. 475.
[12] [1941] 2 K.B. 270.
[13] [1958] Ch. 1.
[14] 29 T.C. 167.
[15] 29 T.C. 491.
[16] 29 T.C. 167.
[17] 29 T.C. 491.
[18] [1958] Ch. 1.

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Subsection (3) is a complete definition subsection: paragraphs (*a*) and (*b*) together cover all the ways of controlling a company. The onus of satisfying the court that section 55 applies is on the Crown. None of the authorities touches the present case.

Cur. adv. vult.

December 17. DANCKWERTS J., reading his judgment, stated the facts and continued: It was pointed out on behalf of the plaintiffs that trustees of a private trust can only exercise powers of a discretionary character upon the unanimous decision of all the trustees, and if they cannot reach agreement they cannot exercise the power at all. Consequently, it was argued that the deceased could not have exercised lawfully the right to vote in respect of the settled shares, except under the authority of the decision of all four trustees, and he would be restrainable by injunction if he sought to disregard the wishes of his co-trustees. Therefore, in actual fact he had not control of the powers of voting in respect of the settled shares, and he had not control of the company.

On behalf of the Commissioners of Inland Revenue, the principal contention was that it was not permissible in applying the Act to go behind the articles of association and the company's register, and, therefore, the deceased, by virtue of his registration as the first of the joint holders, and the provisions of article 61 of Table A, had control of the company, and any obligations that he might owe to his co-trustees could be disregarded.

I was referred to a number of authorities, none of which was a decision in respect of section 55 of the Finance Act, 1940. In *B. W. Noble Ltd.* v. *Inland Revenue Commissioners* [1] the question arose on section 53 (2) (*c*) of the Finance Act, 1920, relating to corporation profits tax, whether a director had "a "controlling interest in the company." The chairman of the directors held half the ordinary shares of the company, and was entitled, upon equal division of opinion among the shareholders, to a casting vote. It was held that he had a controlling interest in the company. Rowlatt J. said [2] that "controlling interest" was a phrase which had a certain well-known meaning; it meant the man whose shareholding in the company was such that he was the shareholder who was more powerful than all the other shareholders put together in general meeting.

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[1] (1926) 12 T.C. 911.

[2] Ibid. 926.

That case was approved by the House of Lords in *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*,[3] which was a case concerned with the levying of national defence contribution under the Finance Act, 1937, Schedule IV, para. 7 (*b*), on a body corporate. The relevant statutory provision required inclusion in the body corporate's profits for this purpose of "all income received by way of dividend or distribution of profits "from any other body corporate in which the first-mentioned "body corporate has a controlling interest and which is not liable "to be assessed to the national defence contribution."

The conclusions of the House of Lords appear to have been that (1) the words "controlling interest" included not only direct control of the company which it is sought to tax, but also an indirect controlling interest, such as the holding of a controlling interest in another company which itself held a controlling interest in the company liable to be assessed to the national defence contribution; and (2) the holding of a bare majority of voting power in a company was in general sufficient to constitute "a "controlling interest," and it was not necessary to hold such a proportion of the shares as would secure the passing of a resolution for which a special majority was required.

In the present case the Commissioners of Inland Revenue principally relied upon *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[4] This was a case relating to excess profits tax under section 13 (9) of the Finance (No. 2) Act, 1939, and the material question was whether the directors of the company had "a controlling interest therein," that is, in the company. The directors held in their own right shares of the company which amounted to less than 50 per cent. of the ordinary share capital of the company. But three of the directors, who were brothers and the trustees of a marriage settlement of a sister, were the registered joint holders of 57,000 ordinary shares. The three brothers had a contingent beneficial interest under the settlement in the event of the death of their sister without issue. If these shares were added to the 209,332 shares held by the directors in their own right they would amount to more than 50 per cent. of the company's 500,000 ordinary shares. The Court of Appeal held that, apart from the special case of a bare trustee, shares of the company owned by the directors as trustees should be taken into account in ascertaining whether the directors had a controlling interest therein; and the House of Lords, without expressing an opinion upon the case of a bare trustee, unanimously affirmed the order of the Court of Appeal.

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[3] [1943] A.C. 335; [1943] 1 All E.R. 13; 29 T.C. 49.

[4] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

Apart from the consideration that the decision of the House of Lords was dealing with a different statute, a distinguishing feature of that case is plainly the fact that the three directors were the only trustees of the settlement which comprised the shares, and so the decision lay with them as to the way in which the votes in respect of the settled shares should be cast. But reliance was placed on behalf of the Commissioners of Inland Revenue upon the observations which their Lordships made in the course of their speeches. Lord Russell of Killowen, after referring to the opinion of the Court of Appeal that, apart from the special case of a bare trustee, there was no halfway house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control, said [5]: "My Lords, I agree with the view of the Court of Appeal. When "the section speaks of directors having a controlling interest in "a company, what it is immediately concerned with in using "the words 'controlling interest' is not the extent to which the "indivduals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, "but the extent to which they have vested in them the power "of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in "general meeting. In other words, the test which is to exclude "a company's business from subsection (9) (*a*) and include it in "(9) (*b*) is the voting power of its directors, not their beneficial "interest in the company."

"For the purpose of such a test, the fact that a vote-carrying "share is vested in a director as trustee seems immaterial. The "power is there, and though it be exercised in breach of trust or "even in breach of an injunction, the vote would be validly cast "vis-à-vis the company, and the resolution until rescinded would "be binding on it. The contention that upon the wording of "section 13 the interest must be confined to beneficial interests "appears to me to be but a repetition of the argument which was "rejected by this House in the case of *British American Tobacco* "*Co. Ltd.* v. *Inland Revenue Commissioners*,[6] in relation to "national defence contribution and the Finance Act, 1937."

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[5] 29 T.C. 167, 179.

[6] [1943] A.C. 335.

Lord Macmillan said [7]: "The question whether the directors "of the respondent company have the control of it by their voting "power as shareholders must, in my view, be determined by the "memorandum and articles of the company and by the register "of shareholders. By the constitution of the company, as I have "already mentioned, the voting power is vested in the ordinary "shareholders, and the register shows that the directors hold a "majority of these shares. As was said by Sir George Jessel "M.R. in *Pulbrook* v. *Richmond Consolidated Mining Co.*[8]: 'The "'company cannot look behind the register as to the beneficial "'interest, but must take the register as conclusive, and cannot "'inquire . . . into the trusts affecting the shares.' So far as "the company is concerned the relation between such of its "shareholders as happen to be trustees and their beneficiaries is "res inter alios. It may be that a trustee-shareholder may, "as between himself and his cestuis que trust, be under a duty "to exercise his vote in a particular manner or a shareholder "may be bound under contract to vote in a particular way (compare *Puddephatt* v. *Leith* [9]). But with such restrictions the "company has nothing to do. It must accept and act upon the "shareholder's vote, notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for "such breach lies elsewhere."

Lord Simonds said [10]: "What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise "of voting rights to carry a resolution at a general meeting of "the company. Can the directors of the respondent company "by the exercise of their voting rights carry such a resolution? "Yes: for they are the registered holders of more than half "the ordinary shares of the company. Therefore they have a "controlling interest in the company. . . . My Lords, in my "opinion the Crown's contention cannot be sustained. Those "who by their votes can control the company do not the less "control it because they may themselves be amenable to some "external control. Theirs is the control, though in the exercise "of it they may be guilty of some breach of obligation, whether "of conscience or of law. It is impossible (an impossibility long "recognized in company law) to enter into an investigation "whether the registered holder of a share is to any and what "extent the beneficial owner. A clean cut there must be."

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[7] 29 T.C. 167, 181.

[8] (1878) 9 Ch.D. 610, 615.

[9] [1916] 1 Ch. 200; 32 T.L.R. 228.

[10] 29 T.C. 167, 184.

John Shields & Co. (Perth) Ltd. v. *Inland Revenue Commissioners* [11] was also an excess profits tax case depending on the meaning of "a controlling interest" in section 13 (9) of the Finance (No. 2) Act, 1939. At all material times more than half the share capital of the appellant company was held by the trustees of the will of the former governing director. The voting rights in respect of these shares resided, under the company's articles of association, in the trustee first named on the company's register, unless all the trustees nominated one of their number for this purpose. No such nomination was made, and the voting rights were held by the first-named trustee, who was not a director of the company. In accordance with their powers under the articles of association, the trustees appointed as governing director of the company one of their number, who was thus in a position to arrange for his own name to appear first on the company's register in respect of the trust shareholding, or to require any member of the company to retire from his membership and to transfer his shares to another member at a valuation. In fact, the governing director so appointed did not exercise these powers. It was held by the Scottish Court of Session that the directors did not have a controlling interest in the company within the meaning of section 13 (9) of the Act. The ground of the decision was that whatever the potentialities of the governing director's powers, by not using them he left the controlling interest in the hands of the trustee who was not a director of the company.

The next case is *Inland Revenue Commissioners* v. *Silverts Ltd.*[12] At all material times four persons were directors of the company. All the "B" shares, which carried half the voting rights, were vested in one of the directors. The "A" shares, which carried the other half of the voting rights, were the subject of a settlement, and were vested in a bank as the custodian trustee of the settlement within the meaning of section 4 of the Public Trustee Act, 1906. Two of the directors were the managing trustees of the settlement. It was held by the Court of Appeal that the bank as a registered holder of all the "A" shares was not merely a nominee or bare trustee; that therefore the controlling interest in the shares must be treated as being in the bank, and it was not possible to investigate the character in which the bank exercised its voting rights as shareholder by reference to the terms of the settlement or of section 4 of the Public Trustee Act, 1906, or otherwise; and that the directors, accordingly, had not a controlling interest in the company.

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[11] (1950) 29 T.C. 475.

[12] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

This was a profits tax case under the Finance Act, 1937. There is a passage in the judgment of the court delivered by Lord Evershed M.R. which is of interest. He said [13]: "In our "judgment, the ratio decidendi in *Bibby's* case [14] is that, in "accordance with well-established principles relating to limited "companies, a question of the rights of members vis-à-vis the "corporation (such as that of voting control under its regulations) "is to be determined by reference, and by reference only, to the "share register beyond which it is not (save possibly in the case "of mere 'nominee' shareholders) permissible to look; and not "that, in the case of a trust, the powers and discretions of exer-"cising votes in regard to shares must be treated as reposing in "the trustees without regard to the terms of the trust or the "right of beneficiaries to direct such exercise. Thus, if (because "the shares were registered in the names of 'nominees' or 'bare "'trustees' or otherwise) it were in any circumstances permis-"sible to look beyond the share register, we do not think the "speeches in the *Bibby* case [15] would prevent inquiry being made "whether those individuals to whom the nominee shareholders "were answerable were themselves obliged by contract or other-"wise to give directions in accordance with instructions received "from some third party." And with reference to the *Bibby* case [15] and the *British American Tobacco* case [16] it is pointed out that in neither case was the question the general one: who controls the company? [17]

The last case is *S. Berendsen Ltd.* v. *Inland Revenue Commissioners.*[18] A company had an issued share capital of 1,000 shares, each of which carried one vote at meetings of the company. The directors of the company between them held 401 of the shares, carrying less than 50 per cent. of the votes at meetings, and a Danish company held 590 shares, carrying over 50 per cent. of the votes. The shareholding of one of the company's directors in the Danish company gave him control of the voting power of the Danish company. On an assessment to profits tax, it was contended by the Crown that the shares of the Danish company should be added to the shares held by the directors for the purpose of ascertaining whether a controlling interest in the company was held by the directors within the meaning of Schedule IV, para. 11, to the Finance Act, 1937, as amended by section 34 of the Finance Act, 1952.

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[13] [1951] Ch. 521, 531.

[14] 29 T.C. 167.

[15] Ibid.

[16] [1943] A.C. 335.

[17] Ibid. 532.

[18] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612.

Wynn-Parry J. (not surprisingly, in view of the cases to which I have referred) held that the share register of the company was the sole test in deciding the ownership of shares, and that it was not permissible to go beyond the register to ascertain whether the directors in fact owned any further shares. But the Court of Appeal reversed this decision, and held that where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate; and that since the Danish company (which was the majority shareholder in the English company) was itself controlled by one of the directors of the English company, the directors of the English company had " a controlling interest " therein " for the purpose of the relevant statutory provision.

It seems to me that in the last case the court, in the search for " the controlling interest," went beyond the articles of the company which was the subject of the inquiry. But on behalf of the commissioners it was sought to distinguish and account for this feature of the case by confining the decision to a case in which it is found that the shareholder on the company's register is a corporation which is incapable of exercising volition and must act through the agency of some human person. If, therefore, it is said, such a person is identified as being the person who by his votes controls the member corporation and he is a director of the original company, then he comes within the description of a director who has " a controlling interest therein." None the less, it appears to me that this result has been reached by examining the position of the shareholder in regard to circumstances which are outside the provisions of the company's articles.

However that may be, it was contended on behalf of the commissioners that the effect of the cases which I have mentioned is that I am bound to have regard only to the fact that by virtue of the company's articles the deceased, as the first on the register of the joint shareholders, alone could vote in respect of the settled shares and I am not entitled to have any regard to the fact that he was merely one of a body of trustees who were in fact, in law and on the register the owners of the shares in question.

Those cases were, however, all cases decided on statutes which were different from the statute on which the present case depends. The phrase used was "a controlling interest in" and not "the control of the company"; and, as has been pointed out on behalf of the executors, those statutes were concerned with the taxation of the company's profits, and the present case is concerned with the duties payable in respect of an individual's estate. Moreover, in the relevant sections of the Finance Act, 1940, there are provisions which definitely require investigation beyond and outside the mere position on the company's register, and no such provisions are to be found in the statutes dealing with excess profits tax and the other taxing provisions which were the subject of the decisions to which I have been referred.

Under section 55 (5) it is necessary to investigate the true position of the registered shareholder to see whether he is in fact a trustee or occupies some other fiduciary capacity in respect of some other person or persons. Then it is necessary to investigate further for the purposes of section 58 (5) and discover whether the position of the shareholder is or is not due to some disposition made by him. If, therefore, it is permissible to examine the position and duties of the registered shareholder in regard to persons off the register, why is it not right to have regard to the fact that the person having the right to vote is not the absolute owner of the shares but merely one of four trustees, particularly when all four are on the register as joint owners? If the investigation is carried this far, it is then apparent that the shareholder in question was not free to cast the votes attached to the shares as a free and unfettered voter but was bound to act only on the unanimous decision of the four registered shareholders. There is no question in the present case about the beneficial interest in the shares. In such circumstances, in my view, the deceased had not control of the company.

An argument was also addressed to me on behalf of the commissioners in regard to the effect of section 55 (3) having regard to the words "shall be deemed to have control," and I was referred to Lord Radcliffe's examination of the uses of such a phrase in *St. Aubyn* v. *Attorney-General*, where he said [19]: "The "word 'deemed' is used a great deal in modern legislation. "Sometimes it is used to impose for the purposes of a statute "an artificial construction of a word or phrase that would not "otherwise prevail. Sometimes it is used to put beyond doubt "a particular construction that might otherwise be uncertain. "Sometimes it is used to give a comprehensive description that

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[19] [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

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"includes what is obvious, what is uncertain and what is, in "the ordinary sense, impossible." This seems to me to resemble the methods of Humpty Dumpty mentioned by Lord Atkin in *Liversidge* v. *Anderson.*[20]

It was contended in the present case that the intention of subsection (3) was to bring within the phrase "the control of "the company" an artificial construction, and it was also contended that the present case fell within subsection (1) without any recourse to subsection (3) at all. I find it unnecessary, however, to make a choice, because it appears to me that, whatever be the intention of subsection (3), there still remains to be decided what the meaning is of the phrases "the control of "the company" and "the control of powers of voting on all "questions . . ."

In my opinion, for the reasons which I have already given, in the circumstances of this case the deceased had neither the control of the company nor the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon.

Order accordingly.

Solicitors: *Gibson & Weldon for J. & A. Bright, Nottingham; Solicitor of Inland Revenue.*

[20] [1942] A.C. 206, 245; 58 T.L.R. 35; [1941] 3 All E.R. 338.

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Feb. 24, 25.

Harman J.

In re STEED'S WILL TRUSTS.

[1958 S. No. 1486.]

Trust and Trustees—Variation of trusts—Act of 1958*—Protective trust—Application for variation—Opposition by trustees—Variation proposed by sole beneficiary—"Arrangement"—Power of court to override discretion of trustees—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By his will, a testator gave and devised certain farm property to his trustees upon trust for sale upon protective trusts, as defined by section 33 of the Trustee Act, 1925, for the benefit of the plaintiff for life, and after her death for such persons as she might by deed or will appoint, and in default of appointment, upon trust for the persons entitled on the distribution of her estate, with a proviso that the plaintiff should have the use and enjoyment of the capital value thereof if she needed it, and that the trustees might apply capital moneys arising on the sale of the farm to or for her benefit provided that they should consider the necessity for retaining sufficient capital to prevent her from ever being without adequate means. The testator also gave to the trustees a sum of £4,000 on trust for the plaintiff on the same protective trusts, and with similar powers of appointment by the plaintiff and for the use of capital for her benefit, and authorised the trustees to use the legacy for the purpose of providing a residence for her. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

On an application under section 1 of the Variation of Trusts Act, 1958,[1] for approval by the court of an "arrangement" proposed by the plaintiff varying the trusts so that the trustees would hold the farm and the legacy on trust for the plaintiff absolutely, which the trustees did not consider would be for the benefit of the plaintiff and declined to approve:—

Held, that this was not an "arrangement" within the meaning of the Act. Where trustees did not surrender their discretion to the court, the court had no power to override a proper exercise of this discretion.

Gisborne v. *Gisborne* (1877) 2 App.Cas. 300 applied.

Held further, that, even if there was an arrangement which the court could approve, the jurisdiction to do so was discretionary and would not be exercised so as to override the decision of responsible trustees clothed with a delicate and difficult discretion which they wished to exercise in a certain way.

ADJOURNED SUMMONS.

By his will, dated August 6, 1954, the testator, Joshua Owen Steed, gave and devised to his trustees, by clause 9 thereof,

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[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of— . . .

"(*d*) any person in respect of any "discretionary interest of his under "protective trusts where the interest "of the principal beneficiary has not "failed or determined,

"any arrangement (by whomsoever "proposed, and whether or not there "is any other person beneficially in"terested who is capable of assenting "thereto) varying or revoking all or "any of the trusts, . . .

"Provided that except by virtue of "paragraph (*d*) of this subsection the "court shall not approve an arrange"ment on behalf of any person unless "the carrying out thereof would be "for the benefit of that person.

"(2) In the foregoing subsection "'protective trusts' means the trusts "specified in paragraphs (i) and (ii) "of subsection (1) of section thirty"three of the Trustee Act, 1925, or "any like trusts, 'the principal bene"'ficiary' has the same meaning as "in the said subsection (1) and "'discretionary interest' means an "interest arising under the trust "specified in paragraph (ii) of the said "subsection (1) or any like trust."

"Loft Farm Cockfield upon trust to sell the same with power to "postpone such sale for so long as they in their absolute discretion "shall consider desirable and until any sale shall be effected "to hold such property and on sale the proceeds of sale thereof "upon protective trusts as defined by section 33 of the Trustee "Act 1925 for the benefit of . . . Gladys Louise Sandford during "her life And from and after the death of the said Gladys "Louise Sandford Upon trust to hold the said properties or the "proceeds of the sale thereof in trust for such person or persons "as the said Gladys Louise Sandford may by deed revocable "or irrevocable or by will or codicil appoint And in default of "appointment upon trust for the persons who may be entitled "in distribution to her estate Provided nevertheless and I hereby declare that the settlement of this property upon the said "Gladys Louise Sandford is made for the purpose of providing "for her during her life but it is my wish that she shall have the "use and enjoyment of the capital value thereof if she needs it "during her life And I direct that if and when such property "shall be sold my Trustees may apply capital moneys from such "sale to or for her benefit at such times and in such proportions "as they may consider to be most to her advantage and that any "portion of the capital may be paid to her as income annually "or at any other periods which my Trustees may think desirable "provided that they shall consider the necessity for retaining "sufficient capital to prevent her from being without adequate "means at any time during her life and if they shall think it "desirable in her interest to buy an annuity for that purpose."

By clause 10, the testator gave a legacy of £4,000 to the trustees "upon trust to invest the same and to pay the income "therefrom to the said Gladys Louise Sandford during her life "and I hereby authorise my trustees to use this legacy if they "in their discretion shall deem it desirable for the purpose of "providing a residence for the said Gladys Louise Sandford either "by purchase or the building of a suitable residence with its "appurtenances in the names of my trustees or by lending it or "any part thereof on mortgage to her if she should purchase "such a residence and so that any residence purchased by my "trustees and this legacy shall be held by them on the same "protective trusts and with similar powers to use capital for her "benefit and with similar powers to her of appointment as are "directed with regard to the Loft Farm Cockfield but if the said "Gladys Louise Sandford shall not at any time live in the "residence or any residence so purchased she shall be entitled to "the income therefrom during her life and my trustees shall have "power to sell any residence so purchased and to buy or build "another for her use or to lend the said money to her for that "purpose."

The testator died on December 13, 1954, and his will was duly proved by the three defendants, the executors and trustees named therein. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

Loft Farm had been let by the testator to the plaintiff's brother, and the plaintiff desired the trustees to build a bungalow on the farm so that she could live there, but the trustees felt that that would not be to her advantage, and that the farm should be sold and the proceeds invested in some more profitable manner. The plaintiff's brother had paid the trustees no rent for the farm and had a number of judgment debts outstanding against him. On May 9, 1958, the plaintiff issued a writ claiming (inter alia) execution of the trusts of the will. On May 15, 1958, the plaintiff took out a summons which sought an order directing the trustees not to sell the farm. Subsequently the plaintiff was given leave (the trustees not objecting) to amend the writ and the summons to ask the court, in pursuance of the powers conferred on it by the Variation of Trusts Act, 1958, to approve an arrangement varying the trust, whereby the trustees should stand possessed of the farm and the property, investments and cash representing the legacy upon trust for the plaintiff absolutely. The trustees opposed the proposals.

Eric Griffith for the plaintiff. The Variation of Trusts Act, 1958, deals with matters of administration, which concern the trustees, and with beneficial interests. This case comes under the second head. An "arrangement" under the Act need not be a bargain inter partes. The Shorter Oxford English Dictionary, vol. 1, p. 99, gives eight meanings for the verb "to arrange," only two of which involve anything in the nature of an agreement. The other six are voluntary acts of one person. Six meanings are given for the noun "arrangement," only one of which is consensual. All the others are either the act of one person or the condition resulting from one person's act of arranging things. "Arrangement" in the Act has, it is submitted, the primary meaning given by the dictionary, i.e., the condition resulting from a putting of things in order. In other words, it means a scheme authorised by the court as a result of a proposal by whomsoever

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proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto.

The purpose of the Act is to extend the powers of the court of varying trusts in the interests of the beneficiaries. It is immaterial that the trustees do not assent. Parliament did not intend that the trustees should have a power of veto, or it would have so provided in the Act. The plaintiff is past the age of child bearing and so the only possible object of the discretionary trust is any husband she may marry. The court is entitled to disregard the benefit of the possible husband because he is the object of a discretionary trust: see section 1 (1) of the Act. It is desirable, as a matter of principle, to give the Act a generous construction and to give " arrangement " one of its general (and not consensual) meanings. This is a case where something should be done to help the plaintiff. She is a sensible woman about 53 years old. She knows what she wants to do—to live in a bungalow on the farm. That is something which the testator contemplated she might do, for he gave express power to enable a residence to be built for her and left the farm on trust for her with a general power of appointment. Therefore, for her to do this would not be foreign to the testator's wishes.

L. H. L. Cohen for the trustees of the will. It was the testator's wish that the plaintiff should never be without means. She has already spent a good deal of her private capital. The trustees consider they have a duty to preserve the capital of the trust fund and to see that the income is paid for her benefit. They think that this arrangement would benefit her brother rather than herself. The trustees do not wish to surrender their discretion to the court. Moreover, the evidence filed on the summons discloses good grounds for executing the trust for sale contained in clause 9 of the will and for retaining the protective trusts.

Harman J. This is an application arising in an action relating to the administration of the estate of Joshua Owen Steed of Long Melford in Suffolk. The testator died on December 13, 1954, and his will was proved by the three defendants, his executors, in March, 1955. He left about £60,000. He was served faithfully for many years at a very small wage, it would appear, by his housekeeper, the plaintiff, who is now a lady of some 53 years of age; and he made some provision for her by his will. The provision is not in its nature of a very ordinary kind.

[His Lordship referred to the relevant clauses of the will and continued:] After the testator's death, the plaintiff decided to go back and live in Long Melford; and the trustees bought her a café there. The plaintiff finds that working at the café is too much for her, and she has now for some time wanted the trustees to sell it. This they have expressed their willingness to do; but they have not done so, for some reason which is not at all clear to me, so that the position is that the plaintiff is still working in this café. She is, or was, considerably in debt as a result. About £2,000 of the legacy has been tied up in the café, as well as her own savings which were invested in the stock-in-trade, and so forth.

The plaintiff has been unable to see eye to eye with the trustees. From the very start, her brother, who was and is tenant of the farm, has either paid no rent or has paid it by way of making allowances to her. He has not paid the trustees anything, and they have taken no proceedings against him. Her life, nevertheless, is very much bound up in his, and in that of his wife and daughter, of whom she is fond, and she has conceived the notion that she would like to get rid of the café, have a bungalow built for her on the farm, and go there to live, and perhaps dabble in chickens, or some such occupation. She says that that has always been her wish and her dream, and that that is how she wishes to conduct her life. At her age, she ought to know what she wants to do. The trustees have not, however, felt able to accede to her wishes. I do not say they have not been attentive to them; they think that any such arrangement will not be for her benefit or advantage, but for her brother's. He appears to be an impecunious person against whom several judgment debts are outstanding. The trustees want to sell the farm and invest the proceeds in some more profitable manner. They point out that they are under a duty to consider the necessity of retaining enough capital to prevent the plaintiff being without means at any time; and they have, or may have, entered into a contract—whether binding or not, I do not know—to sell the farm.

It was that which produced the writ in this action, a curious form of procedure, but there it is. On May 9 of last year a writ was issued claiming execution of the trusts created by clauses 9 and 10 of the will for the benefit of the plaintiff; and an injunction to restrain the defendants from selling the farm. Interlocutory proceedings were not necessary because the trustees agreed to hold their hand, and their proposed purchaser agreed to do the same, pending the working out of this present litigation. Then, a few days after the issue of the writ, the plaintiff issued this summons in the action asking for an order directing the defendants, as trustees of the will, to abstain from selling the farm without her consent, and further and other relief. Whether any such relief could be granted is a matter which I will not now discuss; but I am inclined to think that it could not. The trustees have a discretionary power which they do not surrender to the court. The court not only will not, but cannot, interfere with it. If a full administration order was made, that would sterilise the trustees' powers, and they could not exercise them without the leave of the court; but no case has been made here for an administration order, and to make one at the instance of a legatee in an estate which shows a large surplus would be a very high-handed thing to do, and not one which the court should indulge in.

The dispute has now taken a rather different turn. Why it has taken so long to come here, I do not know. The present situation is that the plaintiff is still set on retaining the farm, and going to live in a bungalow to be built for her by the trustees on part of it; and the trustees still say that in the exercise of their discretion they do not propose to do anything of the kind.

Pending this summons, the Variation of Trusts Act, 1958, was passed, and the writ has now been amended to refer to that Act and also to the Trustee Act, 1925, although I do not think that the present matter comes within section 57 of that Act. It is said now that what is wanted of the court is that "the arrangement specified in the schedule hereto may be approved in "pursuance of the powers conferred by the Variation of Trusts "Act, 1958." When you look at the "arrangement," it is that the trustees shall stand possessed of the farm and of the £4,000 upon trust for the plaintiff absolutely, the effect of which would be to revoke the trusts in clauses 9 and 10 of the will and to turn them into plain legacies to the plaintiff. When one turns to the Act, one finds that section 1 provides: "Where property, whether "real or personal, is held on trusts arising, whether before or "after the passing of this Act, under any will, settlement or "other disposition, the court may if it thinks fit by order approve "on behalf of," and then there is a list of persons being persons contingently interested, or children unborn, or persons having only a right under a discretionary trust. On behalf of any of those classes of persons, the court may approve "any arrangement (by whomsoever proposed, and whether or not there is "any other person beneficially interested who is capable of "assenting thereto) varying or revoking all or any of the trusts,

" or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts "; and there is a proviso that no approval shall be given unless the court is of opinion that it will be for the benefit of the person on whose behalf the approval is sought, unless such a person is a mere possible object of a discretionary trust.

The so-called " arrangement " here is an arrangement which is simply an application at the plaintiff's behest to revoke all the trusts which stand between her and absolute dominion over these funds. What she wants to do is to override the discretionary powers given to the trustees and to take command instead. It is true that, if everybody possibly interested came to the trustees, they having such a discretion as this, and applied to them to hand over the funds, they must do so. That is not the position here. The plaintiff might hereafter marry. Mr. Griffith said that, assuming (as I do) that she is past possibility of issue so that any husband she may marry is a possible object of the discretionary trust, then it is on his behalf that the court may approve the arrangement without looking at his benefit, because he is only the object of a discretionary trust; and that, therefore, the court need not have regard to anyone's benefit, because the benefit of the plaintiff herself is not a matter mentioned in the Act, and it is an arrangement made by her. She has, says Mr. Griffith, so arranged her affairs, and the court has no further concern in the matter except to approve it on behalf of this hypothetical and shadowy spouse.

I am not going to take that view of the Act. It seems to me that the arrangement to which the Act refers must be something arranged between A, B and C, whoever they may be. It is true that the Act specifically provides that there need be no other person beneficially interested capable of assenting to the arrangement; but does that mean that the arrangement can be made by A alone in face of the opposition of the trustees and that such a thing can be called an " arrangement "? I do not think so. The trustees here do not surrender their discretion to the court, and it has been the law for nearly 100 years since the decision in *Gisborne* v. *Gisborne* [1] that, where trustees are properly exercising their discretion, the court is without power to override them or to take that discretion out of their hands. Is it to be said that this Act was meant to enable a beneficiary not absolutely entitled to override the discretionary powers and protective trusts which the trustees desire to exercise? I think not. I do not think that I have any authority to do so, even if I would.

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[1] (1877) 2 App.Cas. 300.

But, supposing that is wrong and the correct view is that which Mr. Griffith so ably pressed upon me, this is nevertheless a discretionary power under which the court may, if it thinks fit, by order approve an arrangement. I am, therefore, not bound to approve, though there be an arrangement and even though everybody of age approves of it and it is for the benefit of the non-existent parties. I still may think that it is not an arrangement which I ought to approve on behalf of the proposer. As I see it, the court's discretion is still absolute. The words "if it "thinks fit" are, after all, put in to reinforce the word "may"; and I should not feel it right, even if the proposal were within the word "arrangement," to override the discretion of the persons appointed by the testator to look after the plaintiff's affairs. This was the testator's money, and he was entitled, within limits, to dispose of it as he thought fit. In my view, it would not be right, where responsible trustees clothed with this kind of delicate and difficult discretionary power by the testator wish to exercise it in a certain way, for the court to say: "I know better than you, and "override the exercise of your discretion." That is not a thing which, in my view, was within the contemplation of the legislature when it conferred these powers on judges under this Act.

In my judgment, therefore, I do not feel that I can override the discretion of these trustees who, I am sure, will look with every sympathy on the plaintiff because she is, to all intents and purposes, the only person interested in this money; and it is only against herself that she has to be protected. Consequently, what may appear to be a right decision on the financial ground but which would break her heart may not be for her benefit. But all those things are matters for the trustees, and not for me, and I do not wish to say anything more about them. All that I can do with this present summons is to dismiss it, which I do. The trustees must have their costs and expenses out of the corpus of the fund.

Application dismissed.

Solicitors: *Field, Roscoe & Co. for Pretty, Dawson & Butters, Ipswich; Sharpe, Pritchard & Co. for Barr & Co., Cambridge.*

J. F. L.

In re C. (AN INFANT).

[1958 C. No. 895.]

1958
June 10.

Harman J.

Conflict of Laws—Diplomatic immunity—Family of diplomat—Infant—Ward of court—Whether infant son of person enjoying diplomatic immunity also immune—Whether father had surrendered his paternal rights—Diplomatic Privileges Act, 1708 (7 *Anne*, *c*. 12), *s*. 3.

C., an infant, was born in Greece of Greek parents in 1943. The mother having been killed in 1947, the father remarried in 1951, and to a large extent handed over control of C. to the present wife. In 1956 the father obtained employment in the Greek Embassy in London, and as such was entitled to diplomatic immunity. At the same time he became separated from the wife. C. was not thereafter ordinarily resident with the father or under his control, but he had always had a say regarding C.'s education. The wife issued an originating summons under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, to make the infant a ward of court, and on a procedure summons by the father to have the wife's summons set aside on the ground of his diplomatic immunity:—

Held, (1) that the father, as respondent to the summons, was entitled to have proceedings stayed on the ground of his diplomatic immunity, and the question arose whether the infant should not be added as respondent.

(2) That the infant also, as the father had not so far surrendered his parental rights as to make the infant not a member of his family, was a person entitled to diplomatic immunity, and the proceedings accordingly should be set aside.

Dictum of Lord Phillimore in *Engelke* v. *Musmann* [1928] A.C. 433, 450; 44 T.L.R. 731 considered.

PROCEDURE SUMMONS.

C., an infant, was born in Greece in 1943 of Greek parents. The mother was killed in an accident in 1947. The father studied in England from 1945 to 1950, and returned to Greece to work there from 1950 to 1955. While in England the father met an Englishwoman, and married her in 1951 after his return to Greece. After the marriage the wife took charge of C. In 1952, without demur on the father's part, she came to England with the child and installed him at her parents' farmhouse in the country. In 1953 the boy was sent back to Greece for a year to begin his schooling there, but apparently neither the father nor his wife thought it satisfactory; he came back here in 1954 and was sent to a boarding school, again, apparently, by arrangement between

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[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

1958

C. (AN INFANT), *In re.*

the two of them. The father came back to England in 1955, and in 1956 he obtained employment with the Greek Embassy, but at the same time he was separated from his wife. In 1957 the child was sent to another boarding school where he still was, and during the last two years he had spent his holidays with the wife's parents. The father had had nowhere to accommodate him and there was only one week or so when he was under a roof provided by his father, and that was in the present year. Up to 1956 the father was impecunious and did not maintain the boy or educate him. Since that time he had done so because he was then in a position to do so. He now owed money to the wife which she or her parents laid out on behalf of the boy. The father was now minded to send the boy back to Greece to continue his education there. The wife was very unwilling for him to do that as she did not want the boy's education to be interrupted.

The wife accordingly issued an originating summons under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, in order that C. should be made a ward of court. The father entered a conditional appearance and asked that the proceedings should be set aside on the ground of his diplomatic immunity.

J. V. Nesbitt for the father. The court has no jurisdiction over any person belonging to the official or domestic suite of an ambassador. This is borne out by Dicey on Conflict of Laws, 7th ed., p. 130. In *The Amazone*[1] it appeared that there was a complete immunity for such persons from "suits and judicial "process." The Diplomatic Immunities (Restriction) Act, 1955, s. 1 (1), specifically refers to the immunities conferred by law on members of official staffs and their families. It follows from the Diplomatic Immunities Act, 1952, s. 1 (1) (*c*), that members of the family of a chief representative, if under the age of 18 years, need not be on the official immunity list prepared by the Foreign Office. As this infant is under the age of 18 years, and as his father is an official on the staff of a foreign ambassador, having diplomatic immunity himself, the infant must himself also have that immunity.

D. A. Thomas for the applicant. The question is whether the court has jurisdiction over this infant in wardship proceedings. In *Engelke* v. *Musmann*[2] Lord Phillimore discussed the matter fully, and it is undoubted that an ambassador himself has immunity which extends to his diplomatic family and domestic servants. It is submitted that that immunity does not extend to the families of his "diplomatic family" or to their domestic servants. On the construction of the statutes concerned, the infant would not have immunity because he does not come within the right category. On the facts, the infant lives with his mother, and not his father; in any event, if the principle is that immunity extends to ambassadors and their staffs to enable them to carry out their work properly, it cannot make any difference to the ambassador, whether or not this infant becomes a ward of court.

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[1] [1940] P. 40; 56 T.L.R. 266; [1940] 1 All E.R. 269.

[2] [1928] A.C. 433, 450.

Harman J. This is a novel application, so far as I know. The wife of the respondent, the father of the infant in question, started proceedings by originating summons under the statutory jurisdiction contained in the Law Reform (Miscellaneous Provisions) Act, 1949, to make the infant a ward of the court. The issue of the summons brought that about. The respondent is employed at the Greek Embassy and, having entered a conditional appearance, he applied to have proceedings stayed on the ground that he was entitled to diplomatic immunity. I do not myself feel any doubt that he is so entitled and would therefore be entitled to have the summons dismissed. The court could, however, add the infant as a respondent and allow the proceedings to be carried on in that way. The real struggle here is whether I ought to take that course, or whether the immunity which the respondent has claimed for himself extends to the infant, his son; that is, as I see it, a question of fact.

[His Lordship stated the facts and continued:] This court is quite used to dealing with foreign infants and has jurisdiction over them while they are in this country, whatever be their nationality, and it can and will deal with questions regarding their education, and so forth. However, the question here raised—and I think it has never been raised before—is whether, first of all, the father is entitled, under the shield of diplomatic immunity, to reject the paternal jurisdiction of the Crown, exercised through the court of Chancery. In my judgment, the answer to that question must be "Yes." I do not see why judicial jurisdiction is immune, so to speak, from diplomatic immunity. In other words, if an ambassador's son were living in the embassy, the court would and must refuse to interfere.

If one looks at the Diplomatic Privileges Act, 1708, which governs this matter, section 3 provides that immunity or protection is thrown round "any ambassador, or other public minister "of any foreign prince or State, authorised and received as such "by Her Majesty, Her Heirs or Successors, or the domestic, or "domestic servant of any such ambassador, or other public "minister." Nothing is said there about the family of the ambassador, but I cannot doubt that the immunity does extend to the family; and Lord Phillimore made a speech in the House of Lords to that effect in *Engelke* v. *Musmann.*[1] After speaking of the ambassador's personal immunity, which he cannot waive, he says[2]: "The ambassador further requires, in order that he "may effectually do his Sovereign's business, that there should "be a like immunity for his personal family, that is to say, his "wife and his children if living with him, his diplomatic family, "as it is sometimes called, that is to say, his counsellors, "secretaries and clerks, whom I take to be intended by the word "'domestic' in the statute of Anne, and his ordinary servants, "described in the statute as 'domestic servants'." Lord Phillimore was of the opinion that "family" was used in the sense of what he called "personal family," that is to say, wife and children living with the ambassador. I cannot doubt either that this immunity of the "personal family" extends to the "personal "family" of the staff of the ambassador, and by "staff" I mean those included in the list which the Foreign Office accepts, and for which there is a certificate in the present case. Halsbury's Laws of England, vol. 7, 3rd ed., p. 272, puts it thus: "The immunities of a diplomatic agent are extended to his family "living with him," and that is because it is considered that the ambassador or his staff ought not to be harassed so as to disturb them in the important duties which they have to perform.

Mr. Nesbitt has drawn my attention to two recent statutes which deal, not with the staff of ambassadors, but with the staff of High Commissioners. The first is the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. In that Act immunity from suit and legal process extends to what are called in section 1 (1) (*c*) "members of the family of "a chief representative or of a member of the official staff of a "chief representative entitled to immunity." That, says Mr. Nesbitt, shows the view that the legislature took in 1952 of the extent of diplomatic immunity in these days.

Similarly, in 1955, there is an Act—the Diplomatic Immunities Restriction Act, 1955—empowering Her Majesty to restrict the immunities of foreign diplomats in this country, in accordance with the restraint put on the immunities of our diplomats in foreign countries, and it provides in section 1 (1): "If it appears

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[1] [1928] A.C. 433.

[2] Ibid. 450.

"to Her Majesty that the personal immunities conferred by law "on the envoys of foreign sovereign Powers accredited to Her "Majesty, their families and servants, and members of the official "staff of such envoys and their families . . ." and so I conclude that if this boy can be regarded as a member of his father's family in the sense in which those words are used by Lord Phillimore, he is also entitled to the immunity which the law throws over diplomatic representatives.

Of course he is a member of his father's family in one sense, but not, I think, for the present purpose unless he is ordinarily resident with, or is under his father's control. It is quite true that this father has to a large extent handed over control of the boy to his present wife. The question is whether he has so far surrendered his parental rights as not to be able to claim that the boy is a member, for this purpose, of his family and, looking at it generally, I do not think I can come to the conclusion that he has so surrendered his parental rights. It is true that the boy has not stayed with him much, no doubt because the boy has stayed mostly in the country. However, he has not surrendered his control over this boy's education. He has always had a say regarding the school to which the boy should go, and now he says, "I have changed my mind. I would like him to be "educated in Greece." This is not unreasonable as the boy has Greek parents on both sides. His stepmother is an Englishwoman and would rather have him educated here, but that will not weigh very heavily unless the father has abandoned his rights, which I do not think he has. Therefore, I have come to the conclusion that the boy is a member of the family of the father and is a person to whom diplomatic immunity should be extended, just as it is to the father. He is not a person whom I should add as a respondent to the summons.

I therefore propose to set the proceedings aside.

Order accordingly.

Solicitors: *Rutland & Crauford; J. D. Langton & Passmore.*

1959
March 5, 6.

Vaisey and
Harman JJ.

In re HASTINGS (No. 3).

Habeas Corpus—Criminal cause or matter—Successive applications—Refusal of applications by Queen's Bench Divisional Court—Application renewed to Chancery Divisional Court—Based on same evidence and same grounds—Whether court entitled to entertain application—Applications to different judges of same Division—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2*—Habeas Corpus Act,* 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 6*—Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 3, 46 *— Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 1, 63.

High Court—Jurisdiction—Divisional Court—Jurisdiction of judge to reserve point for its consideration—Supreme Court of Judicature Act, 1873, *s.* 46.

High Court—Division—Judge of High Court—Assignment to particular Division—Divisions not separate courts.

An applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by a Divisional Court of the Chancery Division, since the decision of a Divisional Court is equivalent to the decision of all the judges of the High Court.

Per Vaisey J. Since the Judicature Act, 1873, the Courts of the Queen's Bench Division and the Court of Chancery no longer exist as separate courts; there is one High Court to which all puisne judges are appointed and they are then assigned to do the business of a particular Division.

Per Harman J. An applicant has not and never has had a right to apply successively from judge to judge of the same Division other than during the vacation.

In re Hastings (*No. 2*) [1959] 1 Q.B. 358; [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625 applied.

APPLICATION for a writ of habeas corpus.

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the other counts were for misdemeanours, counts two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, passing sentence, said: "Edward Thomas "Hastings, you have been convicted on the plainest evidence "of deliberate, calculated and systematic frauds. Those frauds "have not only affected companies well able to sustain loss but "have cruelly brought grave financial burdens on little men which "it will be difficult for them to bear. This is by no means "the first time you have been convicted of dishonesty. You "are a menace to the integrity and health of the commercial "community. You will go to prison for four years' corrective "training."

The recorder did not say "concurrent on each count" and the sentence endorsed on the indictment was merely "four years' "corrective training." That was also the sentence entered on the calendar for the session of the court and on the warrant of commitment sent to the Governor of Walton Prison where the applicant was detained.

The applicant was given leave to appeal against conviction to the Court of Criminal Appeal in respect of the first and two other counts. On December 18, 1957, his appeal was heard and in the result the count for felony was quashed, the appeal in relation to the two other counts being dismissed. There was no alteration in the sentence. Pearson J., who gave the judgment of the court, stated expressly that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable and there would be no reason for interfering with it on any view.

The applicant applied for a writ of habeas corpus directed to the Governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one general sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence and he was not lawfully detained.

The application was heard by a Divisional Court consisting of Lord Goddard C.J., Streatfeild and Slade JJ. on March 7, 1958,[1] but the writ was refused, the court holding that, as a matter of construction, the words used by the recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant appealed from that decision to the Court of Appeal, who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction.[2]

On October 24, 1958, the applicant made a fresh application for the writ (on this occasion directed to the Governor of H.M.

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[1] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

[2] The Times, July 29, 1958.

Prison, Wandsworth, where he was then detained) to a Divisional Court of the Queen's Bench Division consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges; the fresh application was made on exactly the same grounds and on the same evidence as in the previous application. The court, being of opinion that there was an arguable point, gave leave to move subject to their being satisfied that they had jurisdiction to hear and were bound to hear a fresh application.

At the hearing of that application on November 4, 1958,[3] the court, acceding to an objection by the Solicitor-General, held that it had no jurisdiction to hear an application which, on the same evidence and on the same grounds, had already been decided by the Divisional Court.

The applicant now applied to a Divisional Court of the Chancery Division convened by Vaisey J. at the request of the Lord Chancellor.

Sir Harry Hylton-Foster Q.C., S.-G. and *Rodger Winn*, for the Crown, took a preliminary objection that the court as constituted was not a Divisional Court of the Chancery Division, such court being the creation of statute alone; but it was suggested that if, pursuant to section 46 of the Judicature Act, 1873[4] (a section which remained unrepealed), one member of the court were to withdraw, the remaining member of the court sitting "elsewhere than in a Divisional Court" might reserve the point "for the consideration of a Divisional Court . . ." HARMAN J. accordingly withdrew, and application was then made under section 46 to VAISEY J., who reserved the point as a proper one to be referred to a Divisional Court. HARMAN J. returned and the hearing proceeded before the Divisional Court thus set up.

Sir Harry Hylton-Foster Q.C., S.-G. No jurisdiction remains in the High Court of Justice to entertain this application, because the applicant, having already obtained the opinion of the High Court on his previous application to the Divisional Court of the Queen's Bench Division, cannot now go to some other part of the same court and seek to induce that other part of the same court to take a different view. That was decided by the Queen's Bench Divisional Court in this case: *In re Hastings* (*No. 2*).[5] That court did not have to decide, and did not decide, whether, since there was nowadays only one High Court, an applicant who had a decision of that one High Court could not go to another part of the same court and invite that other part to make a different decision. That is the first problem which this court has to consider.

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[3] [1959] 1 Q.B. 358; [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625.

[4] Supreme Court of Judicature Act, 1873, s. 46: "Subject to any "rules of court, any judge of the said "High Court, sitting in the exercise "of its jurisdiction elsewhere than in "a Divisional Court, may reserve any "case, or any point in a case, for "the consideration of a Divisional "Court. . . ."

Two questions arise: first, did the High Court of Chancery before the Judicature Acts have jurisdiction to entertain an application for a writ of habeas corpus in a criminal matter by a person such as this applicant who is "convict and in execution." The High Court of Chancery did have such jurisdiction; it existed before the Habeas Corpus Act, 1679, and probably stemmed from Magna Carta: see Bacon's Abridgement (7th ed., vol. 4, p. 117) and Lord Eldon's decision in *Crowley's* case,[6] referred to by Lord Parker C.J. in *In re Hastings* (*No. 2*).[7] This court will be asked to treat *Crowley's* case [8] as having decided that the High Court of Chancery had jurisdiction to grant the writ both in term time and in vacation.

Secondly, the effect of the Judicature Act, 1873, was to vest in one court, namely, the High Court of Justice, any jurisdiction which the Lord Chancellor or any other judges of the High Court of Chancery previously had in habeas corpus. Since that Act, an application made to the High Court of Justice is an application made to all the judges thereof.

[VAISEY J. Every judgment we give and every order we make is an order of Her Majesty's High Court of Justice. We are not exercising the jurisdiction of the High Court of Chancery and its successor, except in so far as its successor is the High Court.]

That is my submission.

The curious situation arising out of the present application is that the court, having powers under section 59 of the Judicature Act, 1925, to transfer the matter to another Division of the High Court, could transfer the application to the Queen's Bench Division, whereupon it would die at once. That is one of the absurdities of the idea that the various Divisions of the High Court can be considered as separate courts and that this case can be re-opened in another Division of the High Court. On the distribution of business of the High Court under section 56 of

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[5] [1959] 1 Q.B. 358.

[6] (1818) 2 Swan. 1.

[7] [1959] 1 Q.B. 358.

[8] 2 Swan. 1.

1959

HASTINGS (No. 3), *In re.*

the Act of 1925 no habeas corpus business was assigned to the Chancery Division. Provision for setting up Divisional Courts is contained in section 63 of the Act; those courts, therefore, are the creation of statute and are all one court.

Reference must be made to certain authorities which are contrary to my submissions—the first is an obscurely worded dictum of Lord Bramwell in *Cox* v. *Hakes*,[9] who alone in that case discussed the matter; he said that there was no need of an appeal in the matter of habeas corpus because if the applicant was refused a writ of habeas corpus he could appeal to the Lord Chancellor; if those words mean that the applicant might apply to the Lord Chancellor as head of the Chancery Division, they would be hostile to my argument, and if they do, it is submitted that they are obiter. The next case is *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[10] where the Privy Council took the view that since the Judicature Act there was only one court so that the applicant was robbed of the right of going from court to court although he might go from judge to judge. It is submitted that the Judicature Act not only robbed the subject of the right of going from court to court but also of going from judge to judge. That case is prayed in aid in so far as it lays down that the applicant cannot go from court to court but not in so far as it states that he can go from judge to judge.

[HARMAN J. The Divisional Court has already thrown doubt on that. Lord Parker C.J. said that they were unwilling to say that it was overruled; but it would be futile to say that one can go from judge to judge and not from court to court.]

In *In re Carroll* [11] Scrutton L.J. said that the Court of Appeal had no original jurisdiction to hear an application of habeas corpus, since it was not part of the High Court but part of the Supreme Court of Judicature, which was composed of the High Court and the Court of Appeal. That case was applied in *Ex parte Chapple*,[12] where Denning L.J., referring to an applicant who was refused a writ of habeas corpus, said that the only remedy of the subject was to go before another Divisional Court or another judge. That dictum was obiter, as the question there (so far as it related to habeas corpus) was whether the Court of Appeal had jurisdiction to entertain an application for habeas corpus.

The authorities do not show any right of appeal from the refusal of the Divisional Court to grant the writ, and, in so far as it is suggested that they do indicate that the rights previously existing in the Chancery Division were not extinguished by the Judicature Acts, they are obiter and should not be followed.

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[9] (1890) 15 App.Cas. 506; 6 T.L.R. 465.

[10] [1928] A.C. 459; 44 T.L.R. 632.

[11] [1931] 1 K.B. 104.

[12] (1950) 66 T.L.R. (Pt. 2) 932.

Neil Butter for the applicant. It is submitted that each judge of the High Court has jurisdiction to hear an application for habeas corpus even though such an application has been heard and refused by another judge or other judges. That is the effect of the Privy Council's decision in the *Eleko* case,[13] and if the court upholds the Crown's contention in the present case it will be saying that that case was wrongly decided in at least one respect.

[HARMAN J. In *Eleko's* case [13] there was no attempt to go from judge to judge but only to go from one part to another part of the same court: see *Eleko's* case.[14]]

The decision was that successive applications could be made, and it deserves most careful consideration before it is said to be wrong. See also *Cox* v. *Hakes*.[15] In *Ex parte Partington* [16] there was an application to the Queen's Bench, which was renewed to the first Baron of the Exchequer Court sitting in chambers. He refused it and the applicant then applied to the Court of Exchequer sitting in open court. It was held that he was justified in so doing, and the Chief Baron clearly thought that there was a right to go from judge to judge. The Divisional Court in *In re Hastings* (*No. 2*) [17] said that the Chief Baron must have been thinking of vacation, but there is no word in the report to suggest it.

[HARMAN J. But how, if it is true that one may go from judge to judge, does that assist in this case?]

If before 1873 there was that right, nothing has in fact taken away that right today. That was decided by *Eleko's* case.[18] The effect of the Judicature Acts of 1873 and 1925 was not to deprive the Chancery Division of the High Court of Justice of the jurisdiction formerly exercised by the Court of Chancery. On this argument it is material to consider the position before the Act of 1873: see *In re Cobbett*,[19] in which it was said that the applicant could go to another court or judge. Lord Parker C.J. in *In re Hastings* (*No. 2*) [20] said that Parke B. might have been referring only to the time when the court was not sitting, but that view is not justified by *Ex parte Partington*[21] and *In re Cobbett.*[22] In *Ex parte Chapple*[23] Somervell L.J. said that applications could be made to other judges of the High Court, if one or more refused; and Denning L.J. also seemed to think that the right existed. Vaughan Williams L.J. in *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar*[24] appeared to recognise the right to go from court to court and judge to judge: see also the Dominions cases cited to the Divisional Court in *In re Hastings* (*No. 2*)[25]; Short and Mellor's Practice of the Crown Office, 2nd ed., p. 320, and Griffits' Guide to Crown Office Practice (1947), p. 113.

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[13] [1928] A.C. 459.
[14] Ibid. 459.
[15] 15 App.Cas. 506.
[16] (1845) 13 M. & W. 679; 9 Jur. 92.
[17] [1959] 1 Q.B. 358.
[18] [1928] A.C. 459.
[19] (1845) 5 L.T.O.S. 130.
[20] [1959] 1 Q.B. 358

There is today in this court, whether as judges of the High Court or of the Chancery Division, a jurisdiction to entertain this application.

[VAISEY J. If this matter had come before us as res integra, the position might have been different, but we have to consider it in the light of the judgment of Lord Parker C.J., which was the judgment of the court. Their conclusion may not bind us, but his summary of the effect of the authorities is something to which we cannot shut our eyes.]

Each application has to be considered independently, and although Lord Parker's judgment is helpful in so far as it sets out the history of habeas corpus, it was confined to the issue that the applicant was not entitled to be heard by another Divisional Court of the Queen's Bench Division. It left open for consideration the essential matters now before this court.

The jurisdiction in habeas corpus is not itself the creature of statute; it continues and can be exercised in ways not expressly provided by the Rules of the Supreme Court. Clearly the judges as judges of the High Court have jurisdictions which are not to be found in any statute; for instance, they have inherent jurisdiction to commit a man to prison for contempt. That is not a jurisdiction assigned to anybody, but a jurisdiction conferred on them ex officio as judges of the High Court. The purpose of the Rules of the Supreme Court was to provide, as a matter of convenience, for the normal administration of justice, and the Rules do not exclude other rights which may exist.

Rex v. *Secretary of State for Home Affairs, Ex parte Greene*[26] supports the submission that the old rights relating to applications for habeas corpus were not abrogated by the Judicature Act; Scott L.J. said [27] that the Rules of the Supreme Court had somewhat simplified the old procedure for obtaining the writ of habeas corpus, but had left the law governing the rights of the subject and the jurisdiction and duties of the High Court unaffected.

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[21] 13 M. & W. 679.

[22] 5 L.T.O.S. 130.

[23] 66 T.L.R. (Pt. 2) 932, 935.

[24] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[25] [1959] 1 Q.B. 358.

[26] [1942] 1 K.B. 87; [1941] 3 All E.R. 104.

The last case to be cited relates to another matter altogether, to that of wards of court which is assigned to the Chancery Division, but certain passages in the judgment indicate that the court thought that it had the right to issue a writ of habeas corpus: see *In re Agar-Ellis.*[28]

It was argued that if there be this right of going from judge to judge, where was it going to stop? In 99 cases out of a 100 applications are made to the Queen's Bench Divisional Court. It is entirely wrong to feel that if the right of going from judge to judge were recognised, there would in practice be a multiplicity of actions. The courts should guard against holding that a statute had taken away a fundamental right save where it has done so in clear terms. In *Jacobs* v. *Brett* [29] it was said that where there is room for ambiguity the court should lean against construing an Act of Parliament so as to take away a fundamental right. That must be the effect of the Act of 1873 if it is now held that there is a right to make only one application in habeas corpus. It must therefore be carefully considered whether the Act of 1873, as subsequently re-enacted, did in fact take away the constitutional right which existed before that time. It has been argued that a fundamental right was being taken away, but, if that were so, one would expect to find some other protection, such as a right of appeal; and the result that there should be no appeal from one application could not have been intended. The applicant is therefore entitled to be heard.

Sir Harry Hylton-Foster Q.C., S.-G. replied.

VAISEY J. In our judgment, the preliminary point taken by the Solicitor-General is well founded and should succeed. I will endeavour, in a few sentences, to explain my own reasons for having come to that conclusion.

[His Lordship stated the facts and continued:] In the second application [1] for a writ of habeas corpus, the earlier application to a Queen's Bench Divisional Court presided over by Lord Goddard

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[27] [1942] 1 K.B. 87, 93.

[28] (1883) 24 Ch.D. 317, 326.

[29] (1875) L.R. 20 Eq.Cas. 1.

[1] [1959] 1 Q.B. 358; [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625.

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having been refused,[2] Lord Parker C.J. considered the position as it had been in the past and was in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction quite obviously had been abrogated by the fact that since the year 1873 there had only been one court, so that there could be no question of going from court to court. [Section 3 of the Supreme Court of Judicature Act, 1873, now section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925.]

There then came the further question, which Lord Parker C.J. considered, whether in fact the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that is still an existing right. Lord Parker C.J. thought that it was not, and he explained the ancient practice by the necessity of finding someone to deal with a case during vacations. In those days a far greater part of the year was taken up by law vacations than it is at present, and when the courts were not sitting in banc if relief was wanted, it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. But Lord Parker thought that, having regard to modern conditions, that right had been practically abrogated.

When it is remembered that by R.S.C., Ord. 59, r. 1, the rule now is that an application for a writ of habeas corpus must be made to a Divisional Court, it is a little hard to see, if there is a right to go from judge to judge, what any judge would do when application was made to him. One would think that all that he could do properly would be to refer the matter to a Divisional Court, so that the position would be exactly the same as if there had been no such right of going from judge to judge.

Lord Parker, in his judgment, came to this final conclusion. He said[3]: " . . . the applicant, having already once been heard " by a Divisional Court of the Queen's Bench Division "—that being, of course, the previous hearing before Lord Goddard and two judges—" is not entitled to be heard again by another Divi- " sional Court of the same Division."

It would have been perfectly possible, and I think logical, if Lord Parker had said: " He is not entitled to be heard again by " any tribunal carved out of the one single tribunal of the High " Court." But Lord Parker was doubtless confining himself to the point strictly in issue. In as much as the Rules of the

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[2] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

[3] [1959] 1 Q.B. 358, 377.

Supreme Court say such applications must go to a Divisional Court of the Queen's Bench Division, I think that the sentence which I have just read from the judgment of Lord Parker means that really there had been an end of the matter when the application was before the court presided over by Lord Goddard, and that Lord Parker thought that that was the end of the case.

The applicant was very anxious to apply to the Chancery Division, but I think that his application is based upon a complete misconception. The mistake the applicant or his advisers made was to assume that the Chancery Division is a separate entity, a separate court, and that either by single judges or by a Divisional Court it can deal with the matter afresh.

The applicant used an expression which he must suppose to be flattering to us who are sitting here. He said in his affidavit that he had decided to come for a "*complete* hearing before a "hitherto unconnected and impartial bench, and this I seek in the "Chancery Court." The number of misconceptions which are bound up in that sentence is almost beyond reckoning. To begin with, while I hope it is an impartial bench, it is certainly not an independent bench. Indeed, as Lord Parker has ruled with, I think, perfect accuracy,| as soon as the Divisional Court of the Queen's Bench Division has come to its conclusion there is an end of the matter, and, as I observed yesterday, it always has to be remembered that our orders are not orders of any particular Division or any particular Divisional Court; our orders are orders of the High Court.| How we, judges of the High Court, could be heard to override, overrule, or otherwise interfere with a judgment which was the result of the hearing by the Divisional Court, or how we could be heard to say that the conclusion of that court, and its order—an order of our own court, the only court which exists, the High Court of Justice—was wrong, and that something else should be done, is beyond my comprehension.

When the Queen's Bench Divisional Court, acting strictly under the rules, came to its conclusion that finally disposed of the application of this applicant for the issue of a writ of habeas corpus, I cannot see how this court, or how we, as judges, could possibly be heard to stultify a decision of the court of which we are ourselves constituent parts: we are all of us judges of the High Court. I cannot see how we could be heard to contradict an order which has been made for us in our name, and by the only court which has jurisdiction in this matter.

It is a curious thing, and I think very notable and encountered in many connections, how hardly this idea of the separate courts dies. The Habeas Corpus Act was passed in the reign of Charles II, and all remember how that monarch with his graceful courtesy apologised to those who surrounded his deathbed for being an unconscionable time a-dying. I think that an "unconscionable time a-dying" may certainly be said of those courts which we thought had been put an end to and were dead and buried in 1873, and yet continually emerge in the minds and in the speech of English people as if they still exist. The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of "Queen's Bench" is referred to in the same way: but there is now only one court—the High Court of Justice. Of course there is nothing wrong with those expressions provided that it is remembered that the orders which we make, sitting as judges to hear either Chancery or Queen's Bench cases, are orders of the one High Court, not of ourselves or of our own particular branch, or part or Division, or emanation of it, so to speak, and that we all act in, as, and on behalf of the one High Court of Justice.

It is said sometimes that there are people abroad who do not always realise that we are not at the moment living under the conditions described in Charles Dickens's novels. I have no doubt that more is known about wards of court from the pages of Bleak House than can be discovered in textbooks or historical books of reference, and I do not forget that there may be others in this court who remember that Tony Weller, the father of Sam Weller, knew enough Latin at any rate to think that habeas corpus was sufficiently well translated by the words "have his carcase." Although these things were known and discussed a hundred years ago, I do not think that people have got very far in knowing the reforms which have been effected, and a good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a "Chancery judge," "a Queen's Bench judge," which mean, respectively, a judge assigned to do the work which is commonly denominated Chancery work, and a judge assigned to do that work which was commonly done in the old court of Queen's Bench. Section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925, obliges us to be appointed under the description of "judges of the High Court," and although my own belief is that that statutory requirement has not always been complied with, still in the times to which I can speak—the past 15 years—every judge has been appointed without any kind of qualification, "a judge of the High Court." That has to be remembered. If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion.

It may take some time for that to become known, if indeed people are interested in knowing it. But the main fact that I wish to emphasise in this case is that there is but one High Court. ("The Supreme Court" is an expression with a different meaning.) There is one High Court to which all Her Majesty's "Puisne Judges," as they are called, belong, and by whose decisions we are bound. Although it is perfectly proper that I or Harman J. should criticise, or indeed on occasions depart from, a decision, speaking colloquially, of the Queen's Bench Division, it is quite possible for us in some other case to refuse to use it as a precedent. It is impossible for us to interfere with an order made in a particular case.

In this case, for instance, the court has already come to a decision, and how can we interfere? It is quite impossible to envisage any such position arising. I do not think that we have jurisdiction to hear this application and I am in favour of dismissing it.

HARMAN J. I concur in the conclusion at which my brother has arrived. It is always sad to be stripped of an illusion, but I, like, I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year in this very case. The decision was based upon this, that there never had been such a right. There had been a right to go from court to court; there had been a right in vacation to go from judge to judge, for the simple reason that the court was not sitting in banc; but there had never been a right in term time to go from one judge to another when the court to which the application should properly be made was available.

Mr. Butter, for whose argument I, for one, am much indebted, said that the clou of his case was this, that there still was this right to go from judge to judge, and that if that were not so the whole structure would come to the ground. He naturally relied very strongly upon the decision of the Privy Council in *Eshugbayi*

Eleko v. *Officer Administering the Government of Nigeria*,[4] and no doubt if Lord Hailsham's observations there are justified there is much to be said for the existence of the right. But I must confess that my belief in that judgment was very much shaken by the Irish case of *The State* (*Dowling*) v. *Kingston* (*No. 2*),[5] and the very cogent judgment of FitzGibbon J. in it, referred to by Lord Parker C.J.

The judgment of the Queen's Bench Divisional Court made good that this supposed right was an illusion. If that be right the rest follows. Nobody doubts that there was a right to go from court to court, as Vaisey J. has already explained. But there are no different courts now to go to. The courts that used to sit in banc have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by R.S.C., Ord. 54, r. 1, to Divisional Courts of the Queen's Bench Division, and that is the only place to which a suppliant may go. He will, in the first instance, it is said, have a right to go to one judge, but the only result of that, except in a case of most extreme urgency, would be that the judge would appoint him to go on to the proper tribunal, namely, the Divisional Court.

Even if there were this right now existing to go from one judge to another it would not, in practice, be any bulwark of the liberty of the subject, for the only result of doing so would be that the applicant would find himself before the Divisional Court.

Lord Parker and his colleagues were very careful not to go further than the court, so to call it, of Queen's Bench. It may be that they wished to refrain from treading on Chancery toes. And so the applicant was encouraged, it may be by the very limitation of the language, to present himself before this tribunal. But, as Vaisey J. has already observed, the judgments pronounced in the Queen's Bench Divisional Court apply to the whole High Court of Justice, and it was only diffidence that prevented our brethren of the Queen's Bench from saying so.

In my judgment, this application therefore is precluded, by the absence of the ancient but imaginary right, to go round and round and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant, having had the judgment of the High Court, cannot have another one.

I concur respectfully in what Lord Parker C.J. says at the end of his judgment, namely, that it seems a pity that, this being a criminal case, there is no appeal. It would seem it would be a good step, as Lord Goddard C.J. was frequently heard to observe, if there was some means of taking a case like this to the House of Lords in order that the subject should not feel that he had a grievance. But that is a matter not within our province. All we can do is to dismiss the application.

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[4] [1928] A.C. 459; 44 T.L.R. 632.

[5] [1937] I.R. 699.

Application dismissed.

Solicitors: *Treasury Solicitor; Official Solicitor.*

I. G. R. M.

In re KNIGHT'S QUESTION.

[1957 K. No. 986.]

1958
March 4.

Harman J.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*Title deeds—Whether property within meaning of section—Claim by husband against wife for possession of title deeds—Husband trustee with no beneficial interest—Whether maintainable under the section—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

A partnership, of which the husband was a member, purchased certain property, and part of the purchase price was provided by a bank by way of loan. In consideration of the loan, the title deeds were deposited with the bank by way of security. In due course the equity of redemption was conveyed to a limited company which paid off the loan. The bank then handed over the title deeds to the husband as trustee for the company and he placed them in a strong room at the matrimonial home. As a result of differences between the husband and the wife, the husband left home, and the wife stayed in possession. When the company's auditors asked for inspection of the title deeds it was discovered that the deeds were in the custody of the wife's solicitors as her agents. On a summons under section 17 of the Married Women's Property Act, 1882,[1] for

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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[1] Married Women's Property Act, 1882, s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons . . . in a summary way to any judge of the High Court . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit. . . ."

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the determination of whether the husband or the wife was entitled to the deeds:—

Held, (1) that title deeds were "property" within the meaning of the section; (2) that a dispute between the husband and the wife as to the possession of the deeds was a matter which could be litigated in a summons taken out under the section, although the husband was a mere trustee with no beneficial interest in the property; (3) that the wife should be ordered forthwith to hand over to the husband the documents of title.

Adjourned summons.

Certain freehold farm lands and premises known as the Hindringham Estate were purchased by a partnership of which the husband, George Coldham Knight, was a member. Part of the purchase price was provided by Barclays Bank Ltd. by way of loan; in consideration of the loan the partners deposited the title deeds of the Hindringham Estate with the bank as security. At a later date, the equity of redemption was conveyed by the partners to G. C. and F. C. Knight Ltd., a limited company, which paid off the loan. The bank, then having no lien on the deeds, handed them over to the husband as trustee for the company, who deposited them in the strong room at the matrimonial home. As a result of differences between the husband and his wife, the husband left the matrimonial home in January, 1957, leaving the wife in possession. In August, 1957, the auditors for the company asked for inspection of the title deeds, but it was discovered that these were not in the possession of the husband, nor were they in the strong room, but were with the wife's solicitors, as her agents. They refused to return them to the husband, who issued this summons under the Married Women's Property Act, 1882, s. 17, for the determination of all questions between the husband and the wife with respect to the title or possession of the deeds or documents of title of the Hindringham Estate, and seeking an order for the return of the title deeds to him.

Stewart Newcombe for the applicant. The court is competent to entertain this summons under section 17 of the Married Women's Property Act, 1882. The husband is the owner of the legal estate, and as such the title deeds are his property and should be returned to him.

W. J. C. Tonge for the respondent. These proceedings being statutory proceedings, and not an action, the applicant cannot have the relief which he seeks. The title deeds themselves are not property; they are merely evidence of ownership, and they do not come within the meaning of "property" as used in section 17 of the Act. *Loosemore* v. *Radford*,[2] which was an action at common law for the recovery of title deeds, shows that the jury could be and would be charged to give a successful plaintiff damages to the extent of the entire value of the estate, but if the title deeds were delivered up, damages would be reduced to 40s.

This case is not really one between husband and wife, but between a trustee and a stranger to the trust, since the applicant is suing not qua husband but qua the owner of the legal estate. There is no dispute as to the ownership of the property itself and the respondent does not claim to have any beneficial interest in it. The present application is an attempt by the applicant to avoid the inability of a husband to sue his wife in tort, and he cannot in these circumstances claim to be a mere trustee and make use of this summary procedure.

HARMAN J. This is an unusual application under the Married Women's Property Act. Section 17, as is well known, provides a summary method of solving questions between husband and wife. The husband here applies for the determination of the question whether he or his wife is entitled to the title deeds of a freehold estate. He asks, if the question be determined in his favour, for an order upon the wife to deliver up the title deeds. It is not in dispute that these title deeds are at the present moment in the hands of the wife's solicitors as her agents; nor is it in dispute that the legal estate in the property is vested in the husband. The wife does not controvert any of the facts in evidence, nor does she set up any right or title, nor interest, on her own behalf; she merely says, in these proceedings anyhow, that the husband can have no relief, these being merely statutory proceedings and not an action.

It appears to be the fact that this property was bought by a partnership in which the husband was one of the partners, and, having been mortgaged for a large sum of money to the bank, the partners subsequently conveyed the equity of redemption to a limited company called G. C. & F. C. Knight Ltd. That company, having paid off, or procured the payment off of, the balance of the mortgage the bank had no more lien on the deeds which had been deposited as security for the loan. There appears to have been no form of mortgage; but in August, 1956, the loan having been fully discharged, the bank handed the title deeds to the applicant, he having retained throughout the legal estate which had been conveyed to him in 1950 when he and his partner bought the property. He therefore has no equitable interest in the property now, the equity being entirely in the limited company. Nevertheless, rebus sic stantibus, he has a right, as I see it, to retain the title deeds in virtue of his ownership of the legal estate, though the company might, I suppose, direct him to transfer the legal estate to some nominee of their own.

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[2] (1842) 9 M. & W. 657.

The husband, having thus obtained the title deeds from the bank, he put them in his strong-room in a house called "Stody "Lodge," the matrimonial home; that is at Melton Constable in Norfolk. He left that matrimonial home in January, 1957, when the marriage between himself and his wife broke up, and he left the deeds behind. During the year 1957 the company's auditors, in the ordinary course of their duties, wished to check the title deeds, and then it was discovered that they were no longer in this strong-room, nor in the possession or power of the husband. On inquiries being made they turned out to be, as I have said, in the hands of the wife's solicitors not under any claim of lien or right, but merely as her agents; so the deeds are in exactly the same position as if they were in the wife's possession.

The husband therefore launches this originating summons, and he says that it is competent for the court to entertain it under section 17 of the Act, which is a familiar section, but I must read a little of it. [His Lordship read from the section and continued:] The wife first contends that title deeds, which are the only matter in dispute here, are not themselves property; they are merely the indicia of title; they are very valuable, no doubt, as such, but not in themselves property; they are merely evidence of property, and therefore they do not come within the word "property." I reject that conclusion. It seems to me clear that title deeds are property, regarded as pieces of paper or parchment, as the case may be. They are things in which a person has a property, and they are themselves pieces of property. It is to be remembered that, before 1926, title deeds to real estate passed to the heir.

The common-law case to which my attention was drawn shows that in a common-law action for title deeds the jury could be, and would be, charged to give to the plaintiff, if he was successful, by way of damages the entire value of the estate, whereas the judgment goes on to say that that would be reduced to 40s. if the deeds were delivered up. That appears in *Loosemore* v.

Radford.[1] It seems to me quite wrong to say that these bits of paper are not themselves property. It is quite true their value is that they show the title to land, but they are themselves, in my judgment, property and can be sued for as such.

The second defence which the wife puts forward is this: she says that this is not a case between husband and wife, but really between a trustee and a stranger to the trust, and that the husband here is not suing qua husband but qua the legal owner of the property, being a trustee and, admittedly, having no beneficial interest in it. She says the ownership of the property is not in dispute between him and her. By "the property" I mean here the estate. She says that he has no beneficial interest in it, and she does not assert for this purpose that she has either. She says he is a mere trustee and that he cannot make use of this useful summary procedure to extract these deeds from her and thus get round the inability of a husband to sue his wife in tort. I think that the answer to that is to be found in the section itself, because the action may be about the title to, or the possession of, property, and therefore it does not matter, as I see it, for the purposes of the section whether what the husband or the wife wishes to establish against the other is title to something or possession of it. There is certainly a dispute here between the husband and the wife as to the possession of these deeds, and that seems to be a matter which, if the deeds are themselves, as I have held, property, falls fair and square within the words of the section, notwithstanding that the husband has no beneficial interest.

I therefore hold that it is competent to adjudicate upon this matter under the section, and upon that footing I can order that the wife do forthwith hand over to the husband the documents of title relating to the property, and it might be useful to have a schedule to the order in which will be set out the deeds which, admittedly, are in the respondent's solicitors' hands, and which are not in evidence before me.

The latest document touching the property, though not dealing with the legal estate, is a declaration of trust, apparently, showing the company's beneficial title, but that appears to be missing at the moment, and there will be no order that the wife hand that over, because it is not proved that she has it, or has had it, in her possession or power.

Order accordingly.

Solicitors: *Withers & Co.; Kenneth Brown, Baker, Baker.*

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[1] (1842) 9 M. & W. 657.

1958
March 12.

Danckwerts J.

LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD.

[1956 L. No. 789.]

Town and Country Planning — Development — Assessment of development value—Land intended to be developed to be viewed as a whole —Land acquired for building purposes—High cost of making part of land suitable for building exceeding value of the whole—Whether development charge payable—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 70 (2).

A local authority by virtue of the Housing Act, 1936, and in pursuance of a local order, acquired some 231 acres of land for development as a building estate. While most of the land was suitable for this purpose, heavy expenditure on site works was incurred in respect of part. This expenditure was greater than the value of the whole estate when valued for building purposes. Planning permission to develop the estate was granted in 1949 and 1952, and apart from certain industrial development, that development was almost entirely carried out prior to November 18, 1952. A dispute arose between the plaintiffs and the defendants over the exigibility of development charge because of the provisions of the Town and Country Planning Act, 1947, s. 70 (2)[1]:—

Held, that development charge was not payable, since regard should be had to the entirety of the land being developed when considering the increase of the value of the land due to the granting of planning permission for the purposes of section 70 (2). The fact that the expenditure needed to render some of the land fit for development exceeded the value of the land devoted as a whole to building purposes rendered such an increase nugatory.

ADJOURNED SUMMONS.

The London County Council acquired the Sheerwater Estate at Woking under the provisions of the Housing Act, 1936, partly by agreement and partly by compulsory purchase under the County of London (Woking, Surrey) Extension Order, 1951.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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[1] Town and Country Planning Act, 1947, s. 70 (2): "In determining "whether any and if so what development charge is to be paid under this "Part of this Act in respect of any "operations or any use of land, the "board shall have regard to the "amount by which the value of the "land with the benefit of planning "permission for those operations or "that use (calculated without regard "to any charge payable in respect "thereof under this Part of this Act "and on the assumption that the "operation or use can lawfully be "carried out or made apart from the "provisions of this Act) exceeds the "value which it would have without "the benefit of such permission, and "shall not give any undue or unreasonable preference or advantage "to one applicant over another."

Planning permission was obtained from the Surrey County Council in respect of all the estate, except that part of it to be developed for industrial purposes, in November, 1949. Permission in respect of the industrial land development was granted by the Woking Urban District Council in March, 1952. In November, 1951, the London County Council applied to the Central Land Board so that the development charge on the whole estate (with the exception of certain small parts either excluded by agreement or exempt from such charge) might be assessed. In consideration of an undertaking by the council to pay the charge when determined, the board agreed to development proceeding before payment. Apart from the industrial land referred to, the development of the estate was completed before November 18, 1952.

The London County Council by this originating summons sought a declaration upon the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948, that for the purpose of determining whether any development charge was to be paid in respect of the operations carried out by them on land forming the major part of the Sheerwater Estate at Woking, the Central Land Board ought to value that land with the benefit of the planning permission which had been granted in respect of it upon the footing that the council would proceed to carry out the said operations within a reasonable time.

Michael Rowe Q.C. and *H. E. Francis* for the council. In assessing the value in this kind of case, the whole of the estate which has been developed should be taken into consideration, together with all the operations proposed to be undertaken as part of that development. The result of such an assessment is that, on the one hand, the enhanced value which might have accrued to the council in respect of part of the land developed by virtue of planning permission received is to be considered, and, on the other hand, any expenditure which had to be incurred under the plan of development in respect of land requiring expenditure before it could be developed must also be considered. It follows, therefore, that if the total amount of expenditure involved in developing part of the land exceeds the enhanced value of the remainder, no development charge will be payable because no increase in the total value of the land will have occurred. This is borne out by the " Practice Notes, being notes on Development " Charges," issued under the Town and Country Planning Act, 1947, and those notes are adopted as part of the argument on behalf of the council.

Denys Buckley for the board. A development charge must be payable in this case on the provisions of section 70 (2) of the Town and Country Planning Act, 1947. The council will have paid for the existing site value, and because of the expropriation of the right to develop, compensation would have been paid to the previous owner. Anyone obtaining permission to develop that land will get an additional value for the right to develop that part of it which can be developed without expenditure, and there can be no legal obligation upon a person who applies for permission to develop anything except that land which it is profitable to develop. It must be assumed that such a person would not develop the other land which, while it would be expensive to develop, would still retain its existing use value. A development charge is therefore justified, representing the difference between the existing use value of the land profitable to develop and the value of it with permission to carry out that development. [Reference was made to *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam.*[2]]

Danckwerts J. This dispute is between the London County Council, who acquired and developed an estate at Woking, and the Central Land Board, who claim that a development charge became payable under the provisions of the Act by virtue of the permission which was given to the development in question. The estate was the Sheerwater Estate at Woking, having an area of 231 acres. The greater part of the land was suitable for development for building houses, but a portion of it was not so suitable, and by reason of that fact the London County Council had to incur considerable expenditure.

Joseph Edward James Toole, the valuer of the London County Council, says in his affidavit: " By reason of the physical " condition of the land the council were compelled to incur very " heavy expenditure on site works and in particular on culverting " a watercourse known as the Rive Ditch which passed through " the land and which took surface water from the town of " Woking. In addition, the council had to make a substantial " contribution to the Surrey County Council pursuant to the " provisions of the Surrey County Council Acts, 1925–1936, " towards the cost of improving a further length of the Rive

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[2] [1939] A.C. 302; 55 T.L.R. 563.

"Ditch outside the boundary of the estate. The total cost of "these works was considerably in excess of the value of the land "as a whole for building purposes."

The council contends that as a result of that the increase in value by reason of the permission was nil. On the other hand, the board contend that the sum of £22,500 was payable. According to a statement by the valuer in his affidavit, that £22,500 was arrived at on the footing that it would be open to the board "to assess the "development charge on the basis that only those parts of the "estate which an ordinary developer would consider it advan-"tageous to develop from a commercial point of view would be "developed and that those parts of the estate which would "involve abnormal development costs would be left un-"developed."

That statement of the basis of the claim was contradicted by an affidavit of Stedman, district valuer of the Guildford District of the Inland Revenue Valuation Department. He says: "I "did not proceed on the footing described [by Toole in his] "affidavit" which I have just read, "but on the footing that "a developer would be at liberty to carry out forthwith so much "of the development as was for the time being profitable and "to defer the remainder of the development until such time "as the carrying out of that further development would be "profitable." So far as I can see, it comes to much the same thing, because it would mean that the unprofitable part would be left undeveloped indefinitely and perhaps never developed at all, and I am bound to say that I thought Mr. Buckley's argument for the board proceeded very much on those lines.

The London County Council, in pursuance of their purpose and powers provided for in this Act, undoubtedly proceeded to develop the whole estate, notwithstanding the heavy expenditure which they had to make in respect of the less profitable part of it. The provisions which are relevant appear in Part VII of the Town and Country Planning Act, 1947. Section 69 provides by subsection (1) as follows: "Subject to the provisions of this Act, there shall "be paid to the Central Land Board in respect of the carrying out "of any operations to which this Part of this Act applies, and in "respect of any use of land to which this Part of this Act applies, "a development charge of such amount (if any) as the board may "determine, and accordingly no such operations shall be carried "out, and no such use shall be instituted or continued, except with "the consent in writing of the Central Land Board, until the "amount of the charge (if any) to be paid in respect of those "operations or that use has been determined by the board in "accordance with the provisions of this Part of this Act, and "the board have certified that the amount so determined has "been paid or secured to their satisfaction in accordance with "those provisions." Then subsection (2) provides: "This Part "of this Act applies to all operations for the carrying out of which "planning permission under Part III of this Act is required, and "to all uses of land for the institution or continuance of which "such permission is so required."

Section 70 (1) provides: "Subject as hereinafter provided, "the Central Land Board shall, on application being made to "them in the manner prescribed by regulations under this Act "by a person having an interest in land sufficient to enable him "to carry out any such operations as aforesaid or to make any "such use as aforesaid, or by a person who satisfies them that "he is able to obtain such an interest, determine whether any "and if so what development charge is to be paid in respect of "those operations or that use: Provided that—(*a*) where planning "permission under Part III of this Act has not been granted "for the carrying out of the said operations or for the institution "or continuance of the said use, the board may postpone the "determination of the development charge to be paid in respect "thereof until such permission has been granted; (*b*) where the "application relates to the carrying out of any operations, the "board may refuse to determine the development charge payable "in respect thereof unless they are satisfied, after consultation "with the local planning authority, that the applicant is able to "carry out those operations, and that he will do so within such "period as the board consider appropriate." That seems to me an essential part of the working of the use provisions. Then in subsection (2) (which Mr. Buckley argued was the only provision dealing with the assessment of the value) it is provided: "In "determining whether any and if so what development charge "is to be paid under this Part of this Act in respect of any "operations or any use of land, the board shall have regard to "the amount by which the value of the land with the benefit of "planning permission for those operations or that use (calculated "without regard to any charge payable in respect thereof under "this Part of this Act and on the assumption that the operation "or use can lawfully be carried out or made apart from the provisions of this Act) exceeds the value which it would have "without the benefit of such permission, and shall not give any "undue or unreasonable preference or advantage to one applicant "over another."

Before turning to the Regulations, I think I should refer to the argument of Mr. Buckley on behalf of the board based on the contention that a development charge must be payable in this case on the provisions of that subsection. He says that the London County Council will have paid for the existing site value, and that by reason of the expropriation of the right to develop the land, compensation would have been paid to the previous owner appropriate to the value of development right. He says that anybody who obtains permission to develop this land will get an additional value for the right to develop that part of the land which can properly be developed without expenditure and he contends that there is no legal obligation upon the person who applies for permission to develop anything except the land which it is profitable to develop; and, therefore, it must be assumed that he would not develop the other land which it would be expensive to develop but which would still preserve its existing use value. Therefore, he says, a development charge was justified representing the difference between the existing use value of what I may call the good land and the value with permission to develop.

It is true that no legal obligation is cast upon the applicant to develop. On the other hand, the board has to be satisfied, as it seems to me, under the provisions of section 70 (1) (*b*) not only that the applicant is able to carry out the operations but that he will carry out such operations within such period as the board consider appropriate, otherwise they can refuse to assess the development charge. It seems to me one operation which the board has to carry out is to determine whether the applicant is a person who can be trusted to carry out the development which he proposes, and if they were not so satisfied it would be their duty to refuse to assess the development charge or to refuse permission altogether. While it may be a matter of good faith and honesty, the actual basis of the valuation to be made under section 70 (2) is that the development the applicant proposes will be carried out, and, therefore, one has no right to assume that any part of the operation will not be carried out. It is to be observed that the value is to be based on the assumption that the operation will be carried out in regard to a particular portion, and is not merely the abstract value of the land with building or development permission. It seems to me that that makes quite a difference. One must regard the value bearing in mind the particular circumstances of the application for development which is made.

Furthermore, it appears to me that "land" in this subsection means all the land in respect of which the application for permission is made.

Having made those remarks, I now propose to pass to the regulations and to certain comments which have been issued by the board which seem to me to support the same view. The Town and Country Planning (Development Charge) Regulations, 1948, No. 1189 of 1948, provide by paragraph 2: "Subject to the "provisions of the Act and of any regulations made thereunder "and for the time being in force, the general principles set out "in the Schedule to these regulations shall be followed by the "board in determining under Part VII of the Act whether any, "and if so what, development charge is to be paid thereunder in "respect of any operations or use of land." Then comes the Schedule, which is the most important part of the document; paragraph 1 provides: "Development charge shall be determined "so as to secure, so far as is practicable, that land can be freely "and readily bought and sold or otherwise disposed of in the open "market at a price neither greater nor less than its value for its "existing use. This object is the governing principle by which "the board are to be guided in determining development charge." Paragraph 2 seems to me very important: "Development charge "shall not be more than the amount which, to the satisfaction of "the board, represents the additional value, measured by normal "processes of valuation, of the land due to planning permission for "a particular development." Therefore, it is plain that the "particular development" must be considered in regard to the amount of the charge. Paragraph 3 provides: "Development "charge shall not be less than the amount referred to in paragraph "2 of this Schedule, unless in the opinion of the board the charge "ought properly to be less in order to comply with the governing "principle." The construction which I have put upon the Act is borne out, I think, not only by the regulations, but also by certain comments which have been issued called "Practice Notes, being "notes on Development Charges" under the Act, and no doubt have been issued by the board for the assistance of persons who have to operate the Act. They have no force of law in any way, but are of interest as being the view which has been taken by the board and which Mr. Rowe has quite properly used as part of his argument. I do not think that I need go through the notes in detail, but perhaps I may say a word about the phrases "consent "value" and "refusal value." "Refusal value" means, roughly, the value without permission. " Consent value " is the enhanced value due to permission being obtained.

With that preliminary observation, I turn to paragraph 58 which reads: " Consent value will thus be calculated on a suitable pro-" cess of valuation and on the basis that: (1) any relevant opera-" tions or uses which are not in law 'development,' would be " permitted to the owner. (2) any operations or uses which are " mentioned in the Third Schedule and which will be available to " the owner, after he has carried out the development permitted " by the planning permission, would be permitted to the owner. . . . " (4) the particular operations or uses permitted by an actual plan-" ning permission (and subject to any conditions in such permis-" sion) will be carried out." Then I turn to paragraph 93: " The " board will be prepared to assess one development charge for a " unit of development of a reasonable size. For the reasons given " in Note XXIX, it is important that developers should apply to the " board to assess the complete development charge for the unit " before the first works are carried out on the land (e.g. road " works or sewers). Application on Form D.1. should therefore " be made before the first works are to be carried out. The " board will normally (other than in very large estates) accept as " the unit for fixing the development charge an area of land which " is likely to comprise one continuous development comprised in " one planning permission." Applying that to the present case, it is quite obvious that the result is that the whole of the estate, that is to say, the difficult portion as well as the portion which is easy to develop, is one unit for the purpose of the assessment of the development charge (if any).

Paragraph 108 is: " It will always be open to an applicant to " ask that the determination of development charge should be " related to a part only of the area of land (or buildings) covered " by a particular planning permission. Question 6 on form D.1 " is designed for this purpose. A planning permission is however " given for a particular operation or change of use, and the " development charge must be assessed upon the assumption that " that permission will be fully operated on the area of land chosen " by the applicant." Paragraph 120 reads: " Circumstances in " which, and the time at which, a Determination of Development " Charge can be made. The amount of a development charge has " to be based on values current at the time the development takes " place. In addition, the consent value bears a direct relation, as " the term suggests, to the planning consent. Before the board " can determine a charge for a particular development, they will "require to be satisfied, not merely that the applicant (or someone "acting with his authority) is able to carry out that development "within a reasonable period but also that the development will in "fact be so carried out." That is a reference to section 70 (1) (*b*). Paragraph 121 reads: "The following is a summary of the conditions which the board consider necessary: (a) the applicant must "be able to show that the development will take place within a "reasonable time. The board are not prepared to generalise on "the meaning of 'reasonable' in this connection, but they are "unlikely to issue a determination if the development is improbable within one year, unless the project is a very large one; or "unless other valuations are necessary (e.g. monopoly value for "licensed premises)."

Those comments are entirely sensible and right to the point, and appear to support exactly the view which has been put forward in this case by Mr. Rowe on behalf of the London County Council. The whole of the estate which the council has developed must be taken into consideration. The whole of the operations which they propose to carry out must be taken into consideration, difficult and easy altogether. It seems to me that the result of that is, as contended for on behalf of the council, that the enhanced value which they might have by virtue of permission in respect of part of the property included in the development plan is entirely wiped out by the heavy expenditure for drainage, and so on, which they have had to incur under the plan in respect of the land which required expenditure before it could be developed.

Mr. Buckley argued that, if no development charge were imposed, the London County Council would be getting the site for less than the existing use value. But that seems to me to be based upon a misapprehension. There is no doubt that the council have had to pay for the site, and I suppose that the amount paid would be in accordance with the use value. There is no doubt that the amount which they had to spend on the development of the land is money which is borne out of the moneys of the council or its ratepayers. It is true that the Central Land Board has presumably paid out something to the previous owner in respect of the development value of the property, or in respect presumably of the property which was available for development, and, if there is no development charge to be exacted, they will not get back that money paid out of the Exchequer. But that does not seem to me to alter the situation. It appears to me that it is quite irrelevant. What one has to consider is what is the increase in value to the London County Council by virtue of the permission to carry out the operations which they propose, and nothing else. It seems to me that the result is nil because of the heavy expenditure which they have had to make on a part of the estate which they were intending to develop. Consequently, I think that the contention on behalf of the London County Council should succeed on this application.

Declaration accordingly.

Solicitors: *Solicitor, London County Council; Treasury Solicitor.*

PHILIPSON-STOW AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[1958 P. No. 1727.]

1959
Jan. 12, 13, 14;
Feb. 10.

Upjohn J.

Revenue — Estate duty — Property chargeable — Immovable property situate outside Great Britain—Settlement—Testamentary disposition—Whether property excluded for estate duty purposes from property passing on death of tenant for life—Proper law of disposition—Finance Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

Conflict of Laws—Immovable property—Assignment—Will—Settlement—Trust for sale—Proper law.

Revenue—Estate duty—Practice—Determination of liability as to estate duty—Desirability of agreed statement of points of law—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 3.

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate "duty not to include any property passing on the death which is "situate out of Great Britain if . . . the proper law regulating "the devolution of the property so situate, or the disposition under "or by reason of which it passes, is the law neither of England nor "of Scotland and . . . (*c*) that the property . . . is, by the law of "the country in which it is situate, immovable property."

By his will made in English form, a testator, having declared that, inasmuch as he had an English domicile, his will should operate as far as the case admitted according to English law, devised certain property in England, defined in the will as his "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over.

1959

PHILIPSON-STOW v. INLAND REVENUE COMMISSIONERS.

The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." The testator died on May 17, 1908, domiciled in England. His wife died on December 22, 1930; and his eldest son on September 23, 1954.

The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. On the question whether the land in South Africa, which was by the law of South Africa immovable property, was, by virtue of section 28 (2) of the Finance Act, 1949, excluded, for estate duty purposes, from the property passing on the death of the testator's son:—

Held, (1) that on the true construction of section 28 (2) of the Finance Act, 1949, "devolution" meant a devolution by law such as kinship, and "disposition" a disposition by instrument; and that, accordingly, on the death of the testator's son, the South African property passed under a disposition, the testator's will, and not by devolution.

Earl of Zetland v. *Lord Advocate* (1878) 3 App.Cas. 505 and *Duke of Northumberland* v. *Attorney-General* [1905] A.C. 406; 21 T.L.R. 639 applied.

(2) That the proper law regulating a testamentary disposition of foreign land was not necessarily the lex situs but depended upon the intention of the testator as ascertained from the construction of the disposition in the light of all the surrounding circumstances; and that, on the true construction of the will, having regard, in particular, to the blending of the whole of the residue into one mass to be held as if it were part of his English "settled estates," the intention of the testator was that English law should govern the whole of his disposition. Accordingly, the South African property was not excluded for estate duty purposes from the property passing on the death of the testator's son.

Duke of Marlborough v. *Attorney-General* (*No. 1*) [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165, *Attorney-General* v. *Johnson* [1907] 2 K.B. 885 and *Attorney-General* v. *Belilios* [1928] 1 K.B. 798; 44 T.L.R. 214 considered.

Observations as to the desirability of an agreed statement of points of law in proceedings under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

ADJOURNED SUMMONS.

By his will, dated March 14, 1898, the testator, Sir Frederic Samuel Philipson Philipson-Stow, declared, by clause 2, that "inasmuch as I have an English domicile it is my wish and "intention that this my will and any codicil I may make shall be "construed and operate as far as the case admits according to "the law of England." Having appointed executors and trustees, the testator, by clause 4 of the will, devised his Blackdown Estate near Fernhurst in the county of Sussex, defined as "my settled "estates," to the use of his wife for her life with remainder to his trustees for a term of 100 years upon trusts which had long since come to an end, with remainder to the use of his eldest son, Sir Elliot Philipson Philipson-Stow, for his life, with remainder to the use of the first and every other son of his eldest son in tail male with remainders over. By clause 5, he directed that, if any person to whom an estate in tail male was limited was born in his lifetime, the estate tail was to be cut down to a life interest.

By clause 25, the testator devised and bequeathed all his real and personal estate whatsoever and wheresoever situate or being either in the United Kingdom or in South Africa, to his trustees upon trust for sale and conversion, with full power and discretion to postpone sale or conversion, and directed them out of the proceeds of sale and conversion to pay his funeral and testamentary expenses and debts, and the legacies and annuities bequeathed by his will or any codicil and to invest the residue at their discretion. Subsequent clauses of the will contained directions to the trustees to set aside out of the residuary estate portions for daughters and younger sons; and by clause 37, the testator provided that "The ultimate residue of the said invest-"ments representing my said residuary estate after setting apart "and appropriating the several funds aforesaid for the benefit "of my daughters and younger sons shall be held by my trustees "upon the trusts following (that is to say) Upon trust after "providing thereout if need be for such keeping up and repair of "my said mansion house and settled estates as aforesaid to pay "the annual income thereof to my said wife during her life she "maintaining and educating and keeping a home for my sons "and daughters And after her death such ultimate residue shall "be held by my trustees as if the moneys or investments repre-"senting the same were capital moneys arising under the Settled "Land Acts 1882 to 1890 from my said settled estates."

Clause 39 contained wide powers for the investment of capital money in the usual trustee securities; and, in addition, on the stocks, funds, shares or securities of any corporation, company or public body, municipal, commercial or otherwise, in the United Kingdom, the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic, and to invest on the security of real estate in any of those Colonies or States. Clause 42 gave the trustees wide powers of managing and cultivating the real leasehold and immovable property whether in England or abroad thereinbefore devised and bequeathed in trust for sale with all the powers of absolute owners; and clause 44 gave power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the trusts or powers in Cape Colony or elsewhere abroad.

The testator died on May 17, 1908, resident and domiciled in England. At the date of his death he owned a five-tenths undivided interest in farm property, known as "Steenbokspan," in the Union of South Africa. The executors and trustees paid the legacies and made provision for the daughters' and younger sons' portions. They retained, in exercise of their power to postpone sale, and at the date of the hearing still retained, the land at Steenbokspan. The income arising from that land had been paid to the testator's widow during her life and, after her death on December 22, 1930, to the testator's eldest son. He died on September 23, 1954, and was succeeded in the enjoyment of the settled estate and capital moneys by his son, Sir Frederic Lawrence Philipson-Stow.

On August 25, 1958, the trustees took out a summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine, inter alia, whether the share in the land at Steenbokspan now forming part of the testator's residuary estate ought to be treated for the purposes of estate duty as excluded, by virtue of section 28 (2) of the Finance Act, 1949,[1] or otherwise, from the property passing on the death of his son, or ought to be treated as passing on such death.

R. Cozens-Hardy Horne for the plaintiffs, trustees of the will. Only one of the conditions in paragraphs (*a*), (*b*) and (*c*) of section 28 (2) of the Finance Act, 1949, need be satisfied. Paragraph (*c*) is admittedly the relevant condition. The proper law regulating the disposition of an immovable by will is, so far as the will relates to the immovable, the lex situs: *In re Moses* [2]; *In re Miller*.[3] Even if, in the present case, the lex situs is not the proper law of the "disposition," it is the proper law regulating the "devolution" of the property. "Devolution" means passing from one who is dead to one who is alive: *Parr* v. *Parr*.[4] In *Earl of Zetland* v. *Lord Advocate* [5] it was held that "devolution by law" in the Succession Duty Act, 1853, means devolution by operation of law. Lord Selborne said [6] that the words "devolution by operation of law" were intended to sweep up every sort of passing on death from one person to another. Lord Selborne seems to have been dealing with a case in which, as here, there was a disposition settling an estate on persons in succession. Succession to that estate would, according to Lord Blackburn,[7] be a devolution under the Succession Duty Act, 1853. [*Duke of Northumberland* v. *Attorney-General* [8] was also referred to.] At the death of the testator's son there was, therefore, a devolution of the property which is governed by the lex situs.

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[1] Finance Act, 1949, s. 28 (2): "As respects property passing on the "death of a person dying after the "commencement of this Part of this "Act, subsection (2) of section two "of the Finance Act, 1894 (which "exempts from estate duty property "situate abroad and not chargeable "with legacy duty or succession "duty), and section twenty-four of "the Finance Act, 1936 (which "restricts the exemption conferred by "the said subsection (2)), shall not "have effect; but that property shall "be deemed for the purposes of estate "duty not to include any property "passing on the death which is "situate out of Great Britain if it is "shown that the proper law regulating the devolution of the property "so situate, or the disposition under "or by reason of which it passes, is "the law neither of England nor of "Scotland and that one at least of "the following conditions is satisfied, "namely,— . . . (*c*) that the property so situate is, by the law of "the country in which it is situate, "immovable property."

On the true construction of the will there was at the death of the testator's son no effective trust of conversion. It is suggested by the Crown that there was a trust for conversion by which something in the nature of notional land or proceeds of sale in England passed on the death of the testator's son. *Attorney-General* v. *Johnson* [9] is relied on in support of that proposition. It is, however, South African land to which this will applies and, even if there were an effective trust for conversion, the exemption contained in section 28 (2) would apply to the proceeds of sale or notional proceeds of sale in the same way as to the property. [Reference was made to *In re Hoyles* [10] and *In re Berchtold*.[11]]

All rights over immovables are governed by the lex situs: see Dicey's Conflict of Laws, 6th ed. (1949), p. 529, r. 127. This rule, which was approved in *In re Anziani*,[12] applies to the present case. All rights over or in relation to this land are governed by South African law. The case for the Crown is based on *Attorney-General* v. *Johnson*.[13] That case does not apply if there was no binding trust for conversion at the death of the testator's son. *Attorney-General* v. *Johnson*[13] was considered in *Attorney-General* v. *Belilios*[14] and *In re White*,[15] and is a difficult case to understand. It stands by itself as a decision on succession duty and the Finance Act, 1894, s. 2; if it means that there is a passing of an English chose of action which is chargeable with estate duty, it is wrong, because it is the property and not the interest in it which passes.

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[2] [1908] 2 Ch. 235.
[3] [1914] 1 Ch. 511.
[4] (1833) 2 L.J.Ch. 167.
[5] (1878) 3 App.Cas. 505.
[6] Ibid. 520.
[7] Ibid. 522.
[8] [1905] A.C. 406.
[9] [1907] 2 K.B. 885.
[10] [1911] 1 Ch. 179; 27 T.L.R. 131.
[11] [1923] 1 Ch. 192.
[12] [1930] 1 Ch. 407.
[13] [1907] 2 K.B. 885.

If it is material to see whether there was a trust for conversion at the death of the testator's son, it is submitted that there was not. To effect a conversion there must be an imperative trust for sale: *In re Twopeny's Settlement*.[16] The doctrine of conversion only applies to regulate the rights of the beneficiaries inter se: *In re Cutcliffe's Will Trusts*[17]; *Midleton* v. *Cottesloe*.[18] In the present case there is no binding trust for sale because (a) the proceeds of sale were, in the events which happened, settled by reference to capital moneys arising under the Settled Land Acts; and (b) there is no equity in anyone to compel conversion. It is argued that the doctrine of conversion applies to this case; but into what is the South African land to be converted? It is competent for the trustees to invest the proceeds of sale in the purchase of land in England or in mortgages of land in England or in South Africa or, it is submitted, on the construction of section 73 of the Settled Land Act, 1925, in the purchase of land in South Africa.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown. The general principle as to liability to estate duty is laid down in *Wallace* v. *Attorney-General*.[19] If a person is to be chargeable with succession duty he must have become entitled to the property by English law. This principle applies to estate duty. Before 1949, succession duty and, therefore, estate duty was chargeable on foreign property if the succeeding beneficiary became entitled to the property by virtue of English law, e.g., under an English trust for sale antecedent to the death of the relevant predecessor. In the case of property passing under a disposition antecedent to the relevant date, the property passes by reason of that disposition; and, in the case of land, it is immaterial what is the proper law governing its devolution. The testator's grandson, the second Sir Frederic, became entitled to the property because he was one of the class of successors designated in the instrument creating the antecedent settlement, i.e., the testator's will. If the wide interpretation of "devolution" is right, no foreign immovable would ever be chargeable with estate duty. Were this the intention of the legislature it is hard to conceive a more inept way of expressing it.

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[13] [1907] 2 K.B. 885.

[14] [1928] 1 K.B. 798.

[15] [1939] Ch. 131; [1938] 2 All E.R. 691.

[16] [1924] 1 Ch. 522.

[17] [1940] Ch. 565; 56 T.L.R. 537; [1940] 2 All E.R. 297.

[18] [1949] A.C. 418; 65 T.L.R. 254; [1949] 1 All E.R. 841.

[19] (1865) L.R. 1 Ch. 1.

It is conceded that, by the lex situs, the interest in the property is an immovable. The only point is, therefore, what is the proper law regulating the disposition (the testator's will) under or by reason of which the interest passes. Where a settlor subjects foreign land to a trust for sale there is no reason why the proper law of the settlement should not be English law. In an ordinary inter vivos settlement of personalty the proper law depends upon the intention of the parties to be ascertained from the instrument and the surrounding circumstances: *Duke of Marlborough* v. *Attorney-General (No. 1)*.[20] The same applies to immovables. [Dicey's Conflict of Laws, 6th ed. (1949), p. 529, was referred to.] It is accepted that the owner of a foreign immovable cannot create in it any rights inconsistent with the lex situs. If and so far as the terms of the settlement conflict with the lex situs, they are ineffective. It does not follow, however, that the owner of a foreign immovable cannot make a disposition of it the proper law of which is other than the lex situs. There is authority for this proposition in the case of a contract comprising foreign immovables: *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[21]; and in the case of a settlement inter vivos: *Attorney-General* v. *Belilios.*[22]

In the case of a settlement of a foreign immovable to be enjoyed in specie, it is difficult to see how the proper law could be other than the lex situs, which is the only law by which the beneficiaries can enforce their rights. In a settlement on trust for sale, however, the possession is vested in the trustees and remains unaffected by any change in the beneficial interests. In such a case the trustees are always amenable to English law and the English courts can compel them to carry out the trust in accordance with the terms of the settlement. The proper law of an English settlement of foreign land on trust for sale, directing the trustees to deal with the proceeds of sale in England, is English: *Attorney-General* v. *Johnson*[23]; *Attorney-General* v. *Belilios.*[24] The same rule applies to a testamentary settlement.

[20] [1945] Ch. 78.

[21] [1910] 2 Ch. 502.

[22] [1928] 1 K.B. 798.

[23] [1907] 2 K.B. 885.

[24] [1928] 1 K.B. 798.

The transmission of the property from the deceased to his personal representatives depends, in the case of land, on the lex situs. It is, however, open to the testator to create a settlement of the property the proper law of which is not the lex situs. If that is right, the question is whether the testator has selected as the proper law of this settlement the law of England. It appears from clauses 2, 25 and 37 of the will that this is a wholly English settlement with no South African elements. *In re Moses* [25] and *In re Miller* [26] relate to the enjoyment of foreign land in specie and do not, therefore, govern this case. As regards *Attorney-General* v. *Johnson*,[27] the Crown does not maintain that what passes is an English chose in action: see *In re Austin Motor Co. Ltd.'s Policies*.[28] The Crown's contention is that the immovable passes; but it passes under a disposition the proper law of which is English.

Cozens-Hardy Horne in reply. Every question with regard to the succession to immovables in consequence of death is governed by the lex situs whether the succession takes place under an intestacy or a will: Dicey's Conflict of Laws, 6th ed. (1949), p. 535. If that is a correct statement of the law, the proper law regulating a disposition of immovables must be the lex situs; that is also borne out by *In re Miller*,[29] *In re Moses* [30] and *In re Berchtold*.[31]

Cur. adv. vult.

February 10. UPJOHN J. The first question on this summons is concerned with the liability to estate duty of a foreign immovable which is subject to the trusts of a settlement created by the will, dated March 14, 1898, of the testator, Sir Frederic Samuel Philipson Philipson-Stow, who died on May 17, 1908, resident and domiciled in England. The immovable in question is a farm property known as "Steenbokspan," situate in the Union of South Africa. At the date of his death the testator owned a five-tenths undivided interest in this property. Since his death, there have been certain changes and partitions; and the property now consists of a seven-eighths interest in a slightly smaller area of the farm. Nothing turns on this, however, or on the fact that the interest is an undivided share in land, because the argument of both sides has proceeded upon the footing, solely, that the property is an immovable situate outside the United Kingdom.

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[25] [1908] 2 Ch. 235.

[26] [1914] 1 Ch. 511.

[27] [1907] 2 K.B. 885.

[28] [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425.

[29] [1914] 1 Ch. 511.

[30] [1908] 2 Ch. 235.

[31] [1923] 1 Ch. 192.

The claim to duty arises on the death of a tenant for life under the trusts of the testamentary settlement, namely, the testator's eldest son, Sir Elliot Philipson Philipson-Stow, who died on September 23, 1954.

[His Lordship referred to the clauses of the will, as set out above, and continued:] The executors and trustees duly got in the residuary estate, paid all debts and legacies, and have made full provision for the younger sons' and daughters' portions. They have retained, and still do retain, the land at Steenbokspan in exercise of their discretion to postpone sale. The income arising from this land was paid to the testator's widow during her life and, after her death on December 22, 1930, to his son, who was succeeded by his son, the second Sir Frederic, in the enjoyment of the settled estates and capital moneys. The fee tail to this Sir Frederic was cut down to a life interest in accordance with the provisions of clause 5 of the will.

Liability to duty of a foreign immovable is now governed by section 28 of the Finance Act, 1949, but, before turning to that section, I propose to make some reference to the history of estate duty legislation in connection with foreign property. By section 2 (2) of the Finance Act, 1894, property passing on the death of a deceased when situate out of the United Kingdom was exempt from duty unless, under the law then in force, legacy or succession duty was payable in respect thereof. For the purposes of this case, it throws one back to section 2 of the Succession Duty Act, 1853. That defined the terms "successor" and "predecessor," and provided that every past or future disposition of property by reason whereof any person had or should become beneficially entitled to any property or the income thereof upon the death of any person, and any devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person to any other person in possession or expectancy, should be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a "succession," and the term "successor" should denote the person so entitled, and the term "predecessor" should denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor was derived.

It was soon decided that some limitation must be placed on the very wide generality of the words used in the Act; and in

Wallace v. *Attorney-General*[1] Lord Cranworth L.C. decided[2] that the Act only operated to tax persons "who become entitled "by virtue of the laws of this country."

Section 2 of the Act was considered in a number of authorities in the House of Lords. In *Earl of Zetland* v. *Lord Advocate*[3] Lord Hatherley pointed out[4] that the section contemplated two classes of cases where the succession might be claimed, namely, a disposition by the instrument under which he claimed or a devolution by law such as heirship or kinship. Lord Macnaghten, in *Duke of Northumberland* v. *Attorney-General*,[5] pointed out that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property could pass, whether by act of parties or by act of law.

The position with regard to estate duty on foreign property was amended by the Finance Act, 1936; but still depended principally upon liability to succession duty.

The Finance Act, 1949, abolished succession duty and so new legislation for the limiting of claims to estate duty upon foreign property became necessary in justice to the subject. That led to section 28 (2), the relevant parts of which I will now read. "(2) As respects property passing on the death of a person dying "after the commencement of this Part of this Act, subsection (2) "of section two of the Finance Act, 1894 (which exempts from "estate duty property situate abroad and not chargeable with "legacy duty or succession duty), and section 24 of the Finance "Act, 1936 (which restricts the exemption conferred by the "said subsection (2)), shall not have effect; but that property "shall be deemed for the purposes of estate duty not to include "any property passing on the death which is situate out of "Great Britain if it is shown that the proper law regulating "the devolution of the property so situate, or the disposition "under or by reason of which it passes, is the law neither of "England nor of Scotland and that one at least of the following "conditions is satisfied, namely"—and I go straight to condition (*c*): "that the property so situate is, by the law of the "country in which it is situate, immovable property."

Mr. Pennycuick, for the Crown, concedes that condition (*c*) is satisfied. It seems to me reasonably clear that the draftsman of this subsection had in mind the terms of the old Succession

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[1] (1865) L.R. 1 Ch. 1.

[2] Ibid. 1, 9.

[3] (1878) 3 App.Cas. 505.

[4] Ibid. 505, 511.

[5] [1905] A.C. 406, 410; 21 T.L.R. 639.

Duty Act and the judicial comments thereon; and that, in using the words "proper law," "disposition" and "devolution," he was really following the general scheme of the old Act as interpreted in the courts. In my judgment, "disposition" in the subsection means a disposition by instrument; and "devolution" means a devolution by law such as kinship. These are true alternatives and are together exhaustive. I do not accept Mr. Horne's argument that a passing might be both a devolution and a disposition; it is one or the other. The fact that, unlike the Succession Duty Act, the subsection does not speak of a "devolution by law" but only of a "devolution" is, in my view, explained by the context of the language used in the subsection.

Even if a wider meaning be given to "devolution" as suggested, it does not seem to me to advance the argument, for the question: How does it devolve? must inevitably bring the answer: By the testator's testamentary disposition.

However, it seems to me to be perfectly clear that, in the case before me, the property passed on the death of his son, under or by reason of a disposition (the testator's will) and not by devolution.

The question, therefore, which I have to determine is what is the proper law of the testator's will concerning the Steenbokspan farm?

The term "proper law," though very familiar in commercial contracts for many years, seems first to have been used in connection with contractual settlements by Lord Greene M.R. in *Duke of Marlborough* v. *Attorney-General* (*No. 1*).[6] He compared as precisely analogous the proper law of a contractual settlement with the law of the domicile in the case of a testator. In that case, however, Lord Greene was principally concerned to show that the true test in connection with liability to duties in the case of a settlement was the proper law of the settlement and not the forum for proceedings. It has not been suggested before me that the domicile of the testator is by itself decisive of the question I have to determine.

In the case of a settlement, the *Marlborough* case[6] clearly decided that the proper law was a matter of the mutual intention of the parties to be ascertained from the terms of the settlement in the light of all relevant and admissible surrounding circumstances.

[6] [1945] Ch. 78, 83; 61 T.L.R. 159; [1945] 1 All E.R. 165.

In the case of a will, what is meant by its proper law? In my view, it is really in the nature of a modern statement of the test propounded by Lord Cranworth in *Wallace* v. *Attorney-General* [7] in the light of the later authorities, e.g., see *Attorney-General* v. *Belilios*,[8] from which I quote later; and I do not think that the parties seriously dispute that the proper law means the law which the testator must have intended to govern the relevant disposition in the will, but there they part.

Mr. Horne, for the subject, put his case in two ways. First, he said that the proper law governing the disposition of a foreign immovable must necessarily be the lex situs; and, secondly, he submitted that, if that be not so, yet upon the true construction of this will the proper law was the law of the Union of South Africa in relation to the farm situate there.

Upon the first point he really based his case on the well-known rule relating to immovables to be found in Dicey's Conflict of Laws, 6th ed. (1949), p. 529, which I will read: "127. All rights "over, or in relation to, an immovable (land) are (subject to the "exceptions hereinafter mentioned) governed by the law of the "country where the immovable is situate (lex situs)." The rule was approved by Maugham L.J. in *In re Anziani*.[9] Mr. Horne submitted rightly that all questions of transmission on death of foreign land must be decided by the lex situs, as must the rights of succession. Thus, all questions of succession on intestacy and the validity of any testamentary disposition of foreign land must necessarily be determined by the lex situs, as must the incidence of enjoyment of such lands: see, for example, *In re Moses* [10] and *In re Miller*,[11] *per* Warrington J.[12]

Mr. Horne also relied on the decision of Russell J. in *In re Berchtold*,[13] who held that the succession on intestacy to proceeds of sale of English land held on trust for sale but not yet sold is determined by the lex situs, and not by the domicile of the intestate.

So he submitted that, although the foreign land is held on trust for sale, you must look at realities; and you find, in fact, foreign land the succession to which must necessarily be governed by the lex situs; and the testator must have intended that law to be the proper law of the disposition.

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[7] L.R. 1 Ch. 1, 5.

[8] [1928] 1 K.B. 798; 44 T.L.R. 214.

[9] [1930] 1 Ch. 407.

[10] [1908] 2 Ch. 235.

[11] [1914] 1 Ch. 511.

[12] Ibid. 519.

[13] [1923] 1 Ch. 192.

The Crown's case on the first point may simply be stated thus. The question of the proper law depends upon the testator's intention, which you must ascertain in accordance with the principles laid down in the *Marlborough* case [14]; that is to say, upon the true construction of the will, in the light of all admissible surrounding circumstances, what is the law which the testator has chosen to apply to his disposition of the Steenbokspan farm? It matters not, Mr. Pennycuick submitted, that on a death the title to foreign land, and the validity of the dispositions in the will concerning that land, must necessarily depend on the lex situs. Counsel concedes that you cannot create by will rights in relation to foreign land which are inconsistent with the local law; but that, he submits, does not preclude the settlor from choosing the law of another country to govern his dispositions in relation to that land so far as those dispositions are valid.

He points out that in commercial contracts the proper law may be that of this country, though it relates to rights and obligations with regard to a contract to grant a mortgage in a foreign country: *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[15]

He relies strongly on *Attorney-General* v. *Johnson*,[16] which, he submits, really covers the case. In that case a testator domiciled in England left the residue of his real and personal estate, which included a tea estate in Assam, to trustees upon trust for sale and conversion, and to pay certain annuities, and to pay the surplus income to certain named persons and to the survivors of them in equal shares. The trustees, under a power contained in the will, retained the Assam estate. On the death of two of those entitled to surplus income, the question arose as to succession duty, and therefore estate duty, on shares of income accruing to the survivors. Bray J. held [17] that the Assam estate, being held on trust for sale, must be treated as property in this country and liable to duty. I am not going to quote from the judgment, for, as Sir Wilfrid Greene M.R. pointed out in *In re White*,[18] the grounds of the decision are not clearly expressed. It does not bind me for it was a decision on a different Act. Furthermore, the Crown, through Mr. Pennycuick, has expressly disclaimed any reliance on that part of the judgment which treated the property in Assam as an English chose in action. However, as a matter of decision, it is of great persuasive authority, for it was quoted without disapproval by Sargant and Lawrence L.JJ. in *Attorney-General* v. *Belilios*,[19] and described during the course of argument by Lord Hanworth M.R.[20] as a very plain case. Sargant L.J. said [21]: "In *Attorney-General* v. "*Johnson* [22] the succession held taxable was in property in Assam "remaining unsold, but the succession was created by an English "will devising the property to English trustees upon trust to sell "and hold for beneficiaries here. The law creating and governing "the trust was English." And Lawrence L.J. said [23]: "*In re* "*Cigala's Settlement Trusts* [24] and *Attorney-General* v. *John-*"*son* [25] are cases where the trusts were established by persons "domiciled in England and were English settlements from the "moment when they were made, therefore constituting disposi-"tions under which the beneficiaries claimed title by virtue of "the laws of England."

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[14] [1945] Ch. 78.

[15] [1910] 2 Ch. 502.

[16] [1907] 2 K.B. 885.

[17] Ibid. 891.

[18] [1939] Ch. 131, 141; [1938] 2 All E.R. 691.

The test laid down by the Act is that of the proper law of the disposition; and, in my judgment, that is essentially a question of the intention of the testator to be ascertained upon the true construction of the disposition in the light of all the relevant surrounding circumstances. I do not accept the submission that proper law of a testamentary disposition of foreign land must necessarily be the lex situs. That certainly is not true of contracts relating to foreign land: see, for example, Exception 1 to Dicey's Rule 127 [Dicey's Conflict of Laws, 6th ed. (1949), p. 541]; and I see no reason why a different rule should apply to a testamentary disposition. Furthermore, it would be quite inconsistent with the observations of Sargant and Lawrence L.JJ.[26] which I have just quoted, both of whom plainly recognised that English law might govern a testamentary disposition of foreign land. It is, as I have said, a question of construction of the will in the light of all the surrounding circumstances.

I turn then to Mr. Horne's second point that, on the true construction of the testator's will, the proper law in relation to the Steenbokspan land is the lex situs. He submitted that there was no effective trust for conversion, for such a trust is only interposed to regulate the rights of the beneficiaries inter se and there is no conflict here. He drew attention to the undoubtedly very wide power to postpone sale and to manage and delegate management; and also to the wide powers of reinvestment in

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[19] [1928] 1 K.B. 798.

[20] Ibid. 809.

[21] Ibid. 821.

[22] [1907] 2 K.B. 885.

[23] [1928] 1 K.B. 798, 827.

[24] (1878) 7 Ch.D. 351.

[25] [1907] 2 K.B. 885.

[26] [1928] 1 K.B. 798, 821, 827.

South Africa. He pointed out, rightly, that, if the land were to be sold, the proceeds might be reinvested in a mortgage of land in South Africa. He suggested that upon the true construction of section 73 of the Settled Land Act, 1925, the proceeds might be applied in the purchase of land in South Africa. I do not propose to decide whether that is so or not, but I will assume it to be so.

Nevertheless, looking at the will of the testator as a whole, it seems to me reasonably clear that he wanted English law to govern all the dispositions contained in his will. First, he said so in clause 2, "so far as the case admits." Secondly, he wanted all his residuary estate wherever situate to be sold and applied first to pay legacies and make provisions for younger children, next to provide an income for the upkeep of his mansion house and the maintenance of his wife and, finally, the residuary moneys were to be treated as capital moneys arising from "my settled "estates." In my judgment, the testator has shown quite clearly that he really wanted everything, after providing for legacies and younger children, to go in one mass as capital moneys for the benefit of his English settled estate; and that seems to me the strongest possible reason for coming to the conclusion that the testator intended English law to govern the whole of his dispositions, notwithstanding the very wide administrative powers and discretions conferred on the trustees.

Mr. Pennycuick in his argument conceded that different testamentary dispositions in the same will might have different proper laws depending upon the true construction of the will. Thus, if a testator devised foreign land to be enjoyed in specie by a number of persons in succession, it must almost necessarily follow that he intended the lex situs to govern the disposition, for only by an appeal to such law could the devisees enforce their rights. On the other hand, I would not regard a gift of foreign land to persons in succession, such gift taking the form of vesting the land in trustees for such persons, as necessarily leading to the conclusion that the testator intended English law to apply; it is a question of construction in each case. What seems to me decisive of this case is the blending of the whole of residue into one mass to be held as part of the testator's English settled estate.

I propose to answer the first question on the summons by saying that the seven-eighth undivided share in the Steenbokspan estate ought to be treated, for the purpose of estate duty, as included as passing on the death of Sir Elliot.

1959

PHILIPSON-STOW
v.
INLAND REVENUE COMMISSIONERS.

Upjohn J.

This summons was taken out under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the terms of which make it clear that the subject must be the plaintiff, though the Crown is the claimant. As frequently happens in these cases, the issue of the summons followed long correspondence between the parties in which, apparently, a large number of points of law were taken by the Crown. Mr. Horne, in opening this case, therefore, perfectly properly had to deal with all these points in his opening. When it came to the Crown's turn, all these points, except the two with which this judgment has been concerned, disappeared; and much of Mr. Horne's opening was wasted time through no fault of his own. In my experience, this happens from time to time in estate duty cases. Where, therefore, the argument between the parties has ranged over a large number of points in correspondence, it seems very desirable that the parties should agree before the hearing precisely upon what points they will rely at the hearing. These points can be put into an agreed statement of points of law so that the court and the parties know exactly what issues of law they will have to meet at the trial. The suitable time for this to be done would seem to be when the matter is before the master, before whom it is desirable that counsel should attend to settle the statement where it is necessary.

Order accordingly.

Solicitors: *Norton Rose & Co.; Solicitor of Inland Revenue.*

J. F. L.

1959
Feb. 25, 26, 27.

Wynn-Parry J.

In re EMERY'S INVESTMENTS TRUSTS. EMERY *v.* EMERY.

[1957 E. 467.]

Equity—Clean hands—Presumption of advancement—Transaction in contravention of foreign revenue law—Foreign securities registered abroad in wife's name—Registration to avoid husband's tax liability in breach of foreign law—Intention that beneficial interest be held equally by husband and wife—Claim by husband to beneficial half interest in securities—Whether husband entitled to set up purpose of registration to rebut presumption of advancement.

Presumption (Rebuttable)—Advancement—Husband and wife—Foreign securities registered in wife's name—Intention that beneficial interest *be held equally by husband and wife—Registration in wife's name to avoid husband's liability to foreign tax—Whether presumption rebutted.*

Conflict of Laws—Revenue laws—Transaction in contravention of foreign tax law—Whether object may be set up to rebut presumption of advancement.

The plaintiff was a British subject married to an American citizen with whom at all material times he lived in South America, where he was employed and accordingly entitled to hold American dollars. American Savings Bonds purchased with the husband's money were registered in the name of the wife (the husband as an alien being unable to hold these bonds) with the husband expressly named as a beneficiary with her. Later the husband changed the bonds for common stock in American securities, which were also registered in the name of the wife; the intention of the husband was that the beneficial interest in the securities should be as to one-half to the wife and the other half to him; but, in order to avoid payment of American withholding tax, to which as an alien he was liable under American Federal law, no mention was made of his beneficial interest.

Subsequently the wife removed the securities and sold them. On a claim by the husband for a declaration that at the date of removal of the securities the wife held them as to one-half for him, alternatively, for the return of half of the proceeds of sale as money had and received by the wife to his use:—

Held, (1) that the registration of the securities in the wife's name raised a presumption of advancement which could not be rebutted on the ground that the purpose of the registration in her name only was to enable the husband to avoid payment of American Federal tax, for equity would not grant relief in respect of a transaction carried out in contravention of law, albeit a foreign revenue law.

Gascoigne v. *Gascoigne* [1918] 1 K.B. 223; 34 T.L.R. 168 and dicta of Denning L.J. in *Regazzoni* v. *K. C. Sethia (1944) Ltd.* [1956] 2 Q.B. 490; [1956] 2 W.L.R. 204; 3 W.L.R. 79; [1956] 2 All E.R. 487 applied.

(2) That once the equitable presumption of advancement arose there was no room for the common law claim based on money had and received to the use of the husband. The husband, accordingly, was not entitled to claim any share in the securities.

Action.

The plaintiff, Ralph Emery, a British subject, claimed a declaration that securities standing on November 30, 1955, in the name of the defendant, his wife, Helen Emery, an American citizen, were as to one-half of their value held by her in trust for him, alternatively, the return of one-half of the proceeds of their sale as money had and received by the defendant to his use.

The following statement of facts is taken from the judgment: The parties were married in 1935. At all material times since 1929 the husband had been employed by one or more companies in the Shell group, and over the material period had fulfilled a succession of tours of duty in the South American Continent and Mexico. During that period, as he was resident in a "hard "currency area," he was entitled to hold dollars, and in September, 1945, he opened a joint account in the names of himself and his wife in New York with a branch of the Irving Trust Company. That account, throughout its existence, was fed by money belonging to the husband. The wife was entitled to draw upon it equally with her husband, which was his way of providing for her needs.

Towards the end of 1947 the husband decided to invest a certain amount from the joint account every month in United States Savings Bonds Series E. Those bonds were not unlike the British National Savings Certificates—namely, over the years they increased in value, but no interest was payable. In pursuance of this intention, the plaintiff, by a letter dated November 14, 1947, wrote to the Irving Trust Company authorising them to invest 75 dollars per month in these savings bonds and to deduct the purchase price from the joint account. The letter ended: "The "co-owner will be my wife, Helen B. Emery." From the outset of this phase of the financial transactions the bonds were to be held for the joint benefit of the husband and wife.

It was not in fact permissible to issue these United States Savings Bonds to a non-resident alien of the United States, which was the plaintiff's status as regards the United States; and the bonds which had been issued were cancelled. Further bonds were issued in the name of the wife, with the husband expressly named as the beneficiary with her. No difficulty arose in that respect, and Wynn-Parry J. was satisfied on the evidence that it was within the relevant Federal law, which was the law applicable.

Until October, 1953, bonds were regularly acquired, as regards all of which the wife was trustee, and she and the husband were the beneficiaries in equal shares. In October, 1953, a material change occurred, when the husband was advised that he would do better from the financial point of view to invest any moneys available in common stock of first-class American companies, rather than to continue to do so in the National Bonds. In order to carry out that intention a letter was written by the husband to the Irving Trust Company on October 14, 1953; the material part of that letter was: "Secondly, my wife and I have decided

" to withdraw the holdings of U.S. Government Series ' E ' bonds " which you hold in her name. Would you kindly arrange to " redeem these, and invest the proceeds in Shell Oil Company " stock in Mrs. Emery's name; we should like to buy 100 shares " in Shell, and the difference would be made up by charging it " to our checking account [The joint account]." That was done, and the shares were taken up in the wife's name. In February, 1954, a purchase was made of New York shares of the Royal Dutch Petroleum Company; in February, 1955, 100 shares of the common stock of the Curtiss Wright Corporation were purchased, and registered in the wife's name; and, finally, in February, 1955, 20 shares of common stock of General Motors Corporation were purchased, and registered in the name of the wife.

The shares were thus left in the name of the wife and dividends were paid into the joint account, the trust company merely holding the certificates. In July, 1955, however, as a result of a talk between the manager of the Trust Company in New York on the one hand, and the husband on the other, the husband was informed that the trust company would like to regularise the position by opening a custody account in the name of the wife. In connection with their custody account, the Irving Trust Company had a particular form which was a full and detailed document.

It was addressed to the trust company by the wife, in whose name it was intended to open the custody account and was dated July 4, 1955. It stated: " Gentlemen: You are hereby authorised " and requested to open a custody account in the name(s) of the " undersigned [the wife] and, as custodian, to hold any securities " or other property deposited with you for such account for, and " subject at all times to the instructions of, the undersigned and " subject to the terms and conditions set forth below . . . " and there was authority to exchange securities in temporary form for securities in definitive form, and other authorities.

In the third clause it was stated: " You are authorised to " execute as agents in the name of the undersigned all declarations, affidavits and certificates of ownership now or hereafter " required in collecting income and principal payments, inserting " thereon the name(s) of the undersigned as the owner(s) of the " securities, without indicating thereon that the undersigned's net " income does not exceed the undersigned's personal exemption " and other credits for Federal income tax purposes. In the event " the status of the undersigned is such that withholding of tax " from such income is required, you are authorised to withhold the "required amounts." Then the status of the undersigned was set out as being: "Citizen of U.S.A. with legal residence in "Brazil." At the end of the document, below the signature of the wife, was a paragraph headed: "Supplementary instructions "for joint account with right of survivorship." That was not treated as relevant, but there followed a delegation of authority which amounted to a power of attorney, and the wife appointed the husband as her attorney with full power of "transfer, sale, "exchange, or other disposition of any or all of the securities . . . "including income and proceeds, at any time held by you for "account of the undersigned . . . "

That document on the face of it held out the wife as being solely interested in the securities and the income therefrom. Wynn-Parry J. found as a fact that the husband was clearly a party to it, in the sense that he had it sent to him, that he read it and that he procured his wife to execute it and to appoint him as her attorney.

In 1955, the wife, having been asked for a divorce by her husband, consulted a solicitor in New York on whose advice on November 30, 1955, she removed all the securities from the Irving Trust Co., as she was entitled to do under terms of the document relating to the custody account. Later she sold the securities. The husband did not discover that the securities had been withdrawn from the trust company until February, 1956, when, acting under the power of attorney, he requested the bank to hand them over to him. Their reply was that they were unable to comply with his request because the wife had already withdrawn the securities.

The marriage came to an end in 1956, and the parties came to England separately. There had been matrimonial proceedings which were not here relevant.

The argument is reported only on the questions of a resulting trust and of advancement.

E. A. Morrison for the husband. The wife held half of the beneficial interest in the securities in trust for her husband. It is clear on the facts that he intended that a half share was to be held for him as beneficiary, and it is immaterial that there is no express recorded trust such as a settlement: see Underhill's Law of Trusts and Trustees, 10th ed., p. 26. On the previous holdings of United States bonds the husband was expressly named as the joint beneficiary with his wife, and there is no evidence of any change of intention. The intention that he is the joint owner is supported by the correspondence in 1947, which is sufficient to constitute a declaration of trust in favour of the husband: *Bentley* v. *Mackay*[1] If the court is not satisfied that these documents constitute a sufficient declaration of trust, it may consider the evidence of conversations and the conduct of the parties; and these wholly support the submission that the husband's intention was that the property was to be held for the benefit of himself and his wife jointly. It is not, moreover, necessary for the creation of a trust for it to be communicated to the trustee and it does not matter that the wife was not informed that her husband was creating a trust for their joint benefit: *Standing* v. *Bowring*[2]; *Middleton* v. *Pollock*.[3]

Alternatively, there is a resulting trust for the husband. The wife has alleged that the transfer of the securities was intended as an out-and-out gift to her; but a gift by a husband to a wife, where, as here, both parties draw on the funds, must be supported by a clear and distinct act on his part showing that he intended to divest himself of the property for that purpose: *Mews* v. *Mews*.[4] The mere fact that the name of the wife was inserted on the banking account does not of itself rebut the presumption of a resulting trust. In *Marshal* v. *Crutwell*[5] it was held that the transfer of the husband's banking account into the joint names of himself and his wife was merely a convenient way of managing the husband's affairs, and did not vest the money beneficially in the wife, although she could, as in the present case, draw on the fund.

It is conceded that the presumption of advancement arises, and that the husband, to establish his claim, must rebut that presumption. The evidence of the husband and his letters clearly show that his intention, which was never shown to have changed, was that the securities were to be their joint property: see *Warren* v. *Gurney*[6] and *Shephard* v. *Cartwright*.[7] His purpose in placing the securities in his wife's name without reference to his beneficial interest was solely to avoid payment of withholding tax, and in no way signified a change in his intention that the securities were the joint property. The manner in which dividends are paid may rebut the presumption of advancement, and throughout they were paid into the joint account on which the husband drew jointly with his wife. Where money is placed in the wife's name to be used solely for domestic purposes, the presumption in favour of a gift is easily removed: *Harrods Ltd.* v. *Tester.*[8] The power of attorney in favour of the husband was executed so that he could retain control of the securities. The evidence taken altogether shows a continued intention that the securities, like the original holdings in United States bonds, were to be the joint property of the husband and wife, which is sufficient to rebut the presumption of advancement.

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[1] (1851) 15 Beav. 12, 19.

[2] (1885) 31 Ch.D. 282; 2 T.L.R. 202.

[3] (1876) 2 Ch.D. 104.

[4] (1852) 15 Beav. 529.

[5] (1875) L.R. 20 Eq. 328.

[6] [1944] 2 All E.R. 472.

[7] [1955] A.C. 431; [1954] 3 W.L.R. 967; [1954] 3 All E.R. 649.

H. E. Francis for the wife. It is common ground that the presumption of advancement applies, and the presumption of advancement rebuts any presumption of a resulting trust which could arise from the fact that the husband provided the money. The doctrine of advancement arises if, from the relationship of the parties, the court will infer that the transfer of the property into the name of another person was intended for that person's benefit: see *Shephard* v. *Cartwright*[9] and *Dunbar* v. *Dunbar.*[10] The presumption of advancement could itself be rebutted by evidence that the husband told his wife at or before the time of the purchase that she was to hold the shares as trustee for their joint benefit. But the evidence admissible to rebut the presumption of advancement is of a very limited nature: *Shephard* v. *Cartwright*[11]; *Grey* v. *Grey.*[12] The rule, which is well settled, as it was stated in *Shephard* v. *Cartwright*,[13] is that evidence of events which take place subsequently to the transfer is inadmissible, and the evidence that the husband retained control of the securities and of his dealings with the dividends is accordingly excluded. The husband stated that his sole object in putting the shares into his wife's name without reference to his beneficial interest was to avoid the payment of United States withholding tax. Had this been United Kingdom tax, the case would have been covered by *Gascoigne* v. *Gascoigne*,[14] which is on all fours with this case. But although this is United States tax and the court will not enforce the tax laws of another country, it was stated by Denning L.J. in *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[15] that the court will not aid a person to disobey the laws of a friendly State, and the husband cannot, therefore, in order to rebut the presumption of advancement, pray in aid the fact that his object was to defeat American fiscal law. His claim cannot, therefore, succeed.

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[8] [1937] 2 All E.R. 236.

[9] [1955] A.C. 431.

[10] [1909] 2 Ch. 639.

[11] [1955] A.C. 431.

[12] (1677) 2 Swanst. 594.

[13] [1955] A.C. 431.

[14] [1918] 1 K.B. 223; 34 T.L.R. 168.

[15] [1956] 2 Q.B. 490, 515; [1956] 2 W.L.R. 204; 3 W.L.R. 79; [1956] 2 All E.R. 487.

Morrison in reply. The husband's object was not to defeat the American tax law, but legitimately so to arrange his affairs as to lessen the burden of taxation. The dictum of Denning L.J. in the *Regazzoni* case [15] was obiter, and was not referred to when the case went to the House of Lords.[16] It has never been held that the arrangement of a person's affairs, not in itself in contravention of the law, to avoid liability to tax is illegal: see *Commissioner of Stamp Duties* v. *Byrnes.*[17]

WYNN-PARRY J. stated the facts as set out above and continued: The husband now seeks to recover from his wife one-half of the property which represents the securities in question. The question which I have to decide is whether or not the husband is entitled to any relevant relief.

I must consider again the end of the first phase, during which there can be no doubt but that the bonds were held in the name of the wife as trustee for the husband and the wife in equal shares so far as the beneficial interest was concerned. But immediately the first investment of the shares in the Shell Oil Company was made and registered in the wife's name, there being no longer any reference whatsoever to the beneficial interest of the husband, the equitable presumption of advancement arose, and it became necessary to answer the question: why were the shares put into the name of the wife?

There are two relevant intentions to be considered in this matter, and it is essential to recognise that circumstance and to distinguish between them. I find as a fact that the intention of the husband throughout was that the beneficial interest in all the shares should be as to half to the wife and as to the other half to him. I do not find, in effect, that he intended the beneficial interest in the whole to be his wife's.

But that is not enough to carry the husband to success, because I still have to consider the question why, contrary to what was done before, the shares were not merely registered in the wife's name, and why there was a complete omission of any reference to his having a beneficial interest. The evidence disclosed that, under the Federal law of the United States, where dividends are payable to a non-resident alien the recipient is liable to a withholding tax which it is the duty either of the company declaring the dividend, or a body in the position of the Irving Trust Company receiving the dividends from the company, to deduct. Also I am satisfied from the evidence that the husband was well aware of that provision of the United States taxation law. That is plain from the documents alone, because in a letter of February 14, 1955, the husband wrote: "With "reference to my cable of February 2 in which I requested you "to purchase for my account 100 shares of Curtiss Wright "Common Stock, I acknowledge receipt of your advices to the "effect that this purchase was carried out at a price of 19.7/8ths. "I omitted to include in my request that this stock should be "registered in the name of my wife, Mrs. Helen B. Emery, who "is a U.S. citizen and therefore not subject to the withholding "tax. Would you kindly see that the registration is made in her "name."

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[15] [1956] 2 Q.B. 490, 515.

[16] [1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286.

[17] [1911] A.C. 386; 27 T.L.R. 408.

That the husband knew about the withholding tax is also clear from a letter dated July 30, 1954, addressed to his wife, in which it was stated: " . . . While reviewing the stock records of Shell Oil "Company, we noticed that instead of withholding 30 per cent. "tax from your June 25 dividend, we withheld only 15 per cent. "resulting in our overpaying you $15.00. We regret any incon- "venience caused you but would appreciate your sending us that "amount with the enclosed copy of this letter." The matter was adjusted, however, as shown from a letter of August 10, 1954, on the trust company being satisfied that the wife was a citizen of the United States.

I am unable to proceed except upon the view that the husband knew that there was this withholding tax and that he, as a non-resident alien, was liable to suffer deduction of tax in respect of his beneficial interest in the securities. Indeed the husband in paragraph 3 of his statement of claim put this tax position in the forefront of his case, because the pleader says: "By reason of "the fact that the defendant, being an American citizen, is not "liable to pay to the American Government a withholding tax of "30 per cent. on the value of dividends earned in the United "States which by an American Federal Statute is chargeable to "non-resident aliens of that country and for no other reason on "the plaintiff's instructions and with the concurrence of the "defendant each and all of the said shares on purchase were "placed in the defendant's name to be held by her for the joint "benefit of the plaintiff and of the defendant."

In the circumstances which I have detailed, it is clear that, had the tax involved been United Kingdom income tax, this case would have been covered by *Gascoigne* v. *Gascoigne*,[1] and would have been concluded against the plaintiff. The headnote in that case is as follows: "A husband took a lease of land in his wife's "name and built a house upon it with his own money. He used "his wife's name in the transaction with her knowledge and "connivance because he was in debt and was desirous of protect-"ing the property from his creditors. In an action by him "against his wife for a declaration that she held the property as "trustee for him:—*Held*, that he could not be allowed to set up "his own fraudulent design as rebutting the presumption that the "conveyance was intended as a gift to her, and that she was "entitled to retain the property for her own use notwithstanding "that she was a party to the fraud." Lush J.,[2] giving the judgment of the Divisional Court, said: "His"—that is, the county court judge's—"findings of fact must be taken to mean that the "plaintiff, with his wife's knowledge and connivance, concocted "the scheme of putting his property in her name, while retaining "the beneficial interest, for the purpose of misleading, defeating "and delaying present or future creditors. This was the whole "basis of the plaintiff's case, and it could not be put in any other "way consistently with his claim to be the owner of the property. "It was the reason he himself gave for his conduct. Now, "assuming that there was evidence to support the finding that "the defendant was a party to the scheme which the plaintiff "admitted, but without deciding it, what the learned judge has "done is this: He has permitted the plaintiff to rebut the "presumption which the law raises by setting up his own "illegality and fraud, and to obtain relief in equity because he has "succeeded in proving it. The plaintiff cannot do this; and, "whether the point was taken or not in the county court this "court cannot allow a judgment to stand which has given relief "under such circumstances as that."

In the analysis it will be found that there were two relevant intentions in *Gascoigne* v. *Gascoigne*.[3] The first was the intention of the husband that the house and land should, so far as the

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[1] [1918] 1 K.B. 223; 34 T.L.R. 168.

[2] [1918] 1 K.B. 223, 226.

[3] [1918] 1 K.B. 223.

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beneficial interest was concerned, be and remain his. The second intention was that he put the land and house into his wife's name with a view to protecting it from his creditors in case he should get into financial difficulties. In this case the first intention, corresponding to that in *Gascoigne* v. *Gascoigne*,[3] is the intention that the husband had throughout that the beneficial interest in the securities should be shared between himself and his wife. The second intention, which corresponds with the second intention in *Gascoigne* v. *Gascoigne*,[3] is the intention which the husband had in putting the securities in his wife's name, without any reference being made to the retention by him of any beneficial interest, namely, to avoid payment of withholding tax on his beneficial interest.

As I take that view I do not propose to traverse the evidence in any detail. It is enough to say that the wife, who was clearly a witness of the truth, was not able to help me very much. The husband, on the other hand, satisfied me by his evidence that his intention was that the beneficial interest should be shared, and there are various indications to support that, such as the retention of control and the payment of the dividends into the joint account. But matters such as the retention of control and the payment into the joint account cannot be decisive when once the equitable presumption of advancement has arisen, and it is necessary for the husband, in his endeavour to rebut that presumption, to assert that the property in question was put into his wife's name in order to avoid the payment on his beneficial interest of tax which would otherwise have been payable, so that, upon the basis that the tax had been United Kingdom tax, it appears to me that *Gascoigne* v. *Gascoigne*[4] completely covers the present case.

I, of course, am dealing here not with United Kingdom income tax, but with the Federal tax of the United States of America. There is, however, authority of the Court of Appeal which binds me in *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[5] I need refer only to a passage in the judgment of Denning L.J., who said[6]: "It is "perfectly true that the courts of this country will not enforce "the revenue laws or the criminal laws of another country at the "suit of that other country, either directly or indirectly. These "courts do not sit to collect taxes for another country or to inflict

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[3] [1918] 1 K.B. 223.

[4] Ibid.

[5] [1956] 2 Q.B. 490; [1956] 2 W.L.R. 204; 3 W.L.R. 79; [1956] 2 All E.R. 487.

[6] [1956] 2 Q.B. 515.

"punishments for it; and this is so even between countries of "the Commonwealth, as the House of Lords held in the *Government of India* v. *Taylor.*[7] These courts will not enforce such "laws at the instance of the foreign country. It is quite another "matter to say that we will take no notice of them. It seems "to me that we should take notice of the laws of a friendly "country, even if they are revenue laws or penal laws or political "laws, however they may be described, at least, to this extent, "that if two people knowingly agree together to break the laws "of a friendly country or to procure someone else to break them "or to assist in the doing of it, then they cannot ask this court "to give its aid to the enforcement of their agreement."

It is unnecessary for me to find in this case—and I do not propose to embark on that task—that there was anything in the nature of an agreement between the husband and the Irving Trust Company improperly to evade the Federal tax laws of the United States. But the principle underlying the passage which I have read from the judgment of Denning L.J., and which was part of the ratio decidendi of his judgment, applies, in my view, to such a case as this where a non-resident alien of the United States has so arranged his affairs that he has avoided payment of the withholding tax which he ought to have paid, and which he would have had to pay if the beneficial interest had been, as it should have been, disclosed to the American authorities.

Counsel for the husband argued that all the husband had really done was to arrange his affairs legitimately so as to lessen the tax which otherwise would have been payable, and he referred to the *Commissioner of Stamp Duties* v. *Byrnes*,[8] a decision of the Privy Council. In that case the testator had purchased some properties which he put into the names of his two sons by way of advancement, and subsequently received the rents and paid for rates and repairs. The Commissioner of Stamps made a claim against the executors in respect of the properties, contending that the gifts were made with an intent to avoid "payment "of duty" within the meaning of the New South Wales Stamp Duties Act, 1898. But the case turned purely on the evidence, and it was held that the transactions in question were not colourable but gifts out and out passing the properties to the sons to the exclusion of all interest in the father. That was therefore quite a different case from the present.

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[7] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.

[8] [1911] A.C. 386; 27 T.L.R. 408.

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In the course of his judgment, Lord Macnaghten said[9]: "It "may be that in making these advances Mr. Byrnes was not "insensible to the advantage of diminishing the burthen of death "duties, but there is nothing wrong in that. No one may act in "contravention of the law. But no one is bound to leave his "property at the mercy of the revenue authorities if he can "legally escape their grasp." There is the nub of the whole thing—"no one may act in contravention of the law." But there was a clear breach of the Federal law in the way these transactions were carried out by the husband's non-disclosure of his beneficial interest in the securities and in the dividends paid thereon. He comes to this court seeking the aid of equity, and in the state of the authorities, and on that evidence, it appears to me that it is impossible for this court to help him.

There was an alternative claim for return of half the proceeds of the sale of the securities on the basis that that half was money had and received by the wife to the use of the husband. But once the equitable presumption of advancement arises, there is no room to entertain that common law claim. Either the presumption of advancement is rebutted, in which case the husband is entitled to his half share in the property, or, as I hold, it is not rebutted and the presumption remains. In the result, for the reasons which I have given, this action will be dismissed with costs.

Judgment for the defendant.

Solicitors: *Bull & Bull; Malkin, Cullis & Sumption.*

I. G. R. M.

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[9] [1911] A.C. 386, 392.

1958
June 27.

Danckwerts J.

RIGDEN *v.* WHITSTABLE URBAN DISTRICT COUNCIL.

[1957 R. 1742.]

Practice—Originating summons—Construction question—Jurisdiction—Person "interested under . . . written instrument"—"Claiming "any legal or equitable right"—Town and Country Planning—Enforcement notice—Validity—Originating summons for declaration that notice invalid—Whether correct procedure—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23—*R.S.C., Ord.* 54A, *rr.* 1, 1A.

[Reported by JENNIFER WEST, Barrister-at-Law.]

Town and Country Planning—Enforcement notice—Form—Validity—Originating summons for declaration that notice invalid—Whether correct procedure—Town and Country Planning Act, 1947, *s.* 23—*R.S.C., Ord.* 54A, *rr.* 1, 1A.

A local authority served on R. an enforcement notice dated September 27, 1957, under section 23 of the Town and Country Planning Act, 1947,[1] to discontinue on or before November 7, 1957, the use of his land as a caravan site, and to restore it to agricultural land. The notice was stated to take effect on October 31, 1957.

By originating summons taken out under R.S.C., Ord. 54A,[2] R.

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[1] Town and Country Planning Act, 1947, s. 23: " . . . (2) Any " notice served under this section " (hereinafter called an ' enforcement " ' notice ') shall specify the development which is alleged to have been " carried out without the grant of " such permission as aforesaid or, as " the case may be, the matters in " respect of which it is alleged that " any such conditions as aforesaid " have not been complied with, and " may require such steps as may be " specified in the notice to be taken " within such period as may be so " specified for restoring the land to " its condition before the development " took place, or for securing compliance with the conditions, as the " case may be; and in particular any " such notice may, for the purpose " aforesaid, require the demolition or " alteration of any buildings or " works, the discontinuance of any " use of land, or the carrying out " on land of any building or other " operations. (3) Subject to the provisions of the next following subsection, an enforcement notice shall " take effect at the expiration of such " period (not being less than 28 days " after the service thereof) as may be " specified therein: Provided that— " (*a*) if within the period aforesaid an " application is made to the local " planning authority under this Part " of this Act for permission for the " retention on the land of any buildings or works, or for the continuance " of any use of the land, to which " the enforcement notice relates, the " notice shall be of no effect pending " the final determination of that " application, and if such permission " as aforesaid is granted on that " application, the notice shall not take " effect; (*b*) if within the period " aforesaid an appeal is made to the " court under the following provisions " of this section by a person on " whom the enforcement notice was " served, the notice shall be of no " effect pending the final determination or withdrawal of the appeal. " (4) If any person on whom an " enforcement notice is served under " this section is aggrieved by the " notice, he may, at any time within " the period mentioned in the last " foregoing subsection, appeal against " the notice to a court of summary " jurisdiction for the petty sessional " division or place within which the " land to which the notice relates is " situated. . . . (5) Any person " aggrieved by a decision of a court " of summary jurisdiction under the " last foregoing subsection may appeal " against that decision to a court of " quarter sessions."

[2] R.S.C., Ord. 54A, r. 1: "In " any Division of the High Court, " any person claiming to be interested " under a deed, will, or other written " instrument may apply by originating summons for the determination " of any question of construction " arising under the instrument, and " for a declaration of the rights of the " persons interested."

R. 1A: "In any Division of the " High Court any person claiming " any legal or equitable right in a " case where the determination of the " question whether he is entitled to " the right depends upon a question " of construction of a statute, may " apply by originating summons for " the determination of such question " of construction, and for a declaration as to the right claimed."

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claimed a declaration that the enforcement notice did not comply with the provisions of section 23, since if he appealed against the notice, the time within which he was required to restore his land would have expired before he had heard the outcome of the appeal, and that the notice was, accordingly, null and void:—

Held, that this was not a proper case for application by originating summons, since R. was merely interested to show that the notice was invalid and was not a person "interested under a ". . . written instrument" within the meaning of Ord. 54A, r. 1, nor was he "claiming any legal or equitable right" which depended on the construction of the Act within the meaning of Ord. 54A, r. 1A.

ADJOURNED SUMMONS.

By originating summons under R.S.C., Ord. 54A, George Rigden (hereinafter called "the plaintiff") asked for a declaration against the Whitstable Urban District Council (hereinafter called "the council") that an enforcement notice served by them upon him was null and void and of no effect, since it did not comply with section 23 of the Town and Country Planning Act, 1947.

The plaintiff had been and still was using his property known as "Limberlost," Church Lane, Seasalter, Whitstable, Kent, which had previously been agricultural land, as a caravan park and site. Under section 12 (2) of the Act, which requires permission to be given for any such development carried on after July 1, 1947, the council, as the planning authority for the district under powers delegated to them by Kent County Council with the consent of the Minister of Housing and Local Government, served the said enforcement notice upon him. Such notice under section 23 was required to take effect not less than 28 days from the service thereof and was subject to right of appeal to a court of summary jurisdiction. The notice served on the plaintiff was dated September 27, 1957, and required him to discontinue the use of his land as a caravan park and camp on or before November 7, 1957, and to restore it to agricultural land. It stated finally that it would take effect on October 31, 1957.

The plaintiff claimed that the notice was void since it took no account of the fact that, if there was an appeal by him, the period within which the notice took effect might be suspended, and in that event the period within which the land was required to be restored would have expired before the outcome of any such appeal could be known. Accordingly, he applied by originating summons as the convenient and appropriate method of determining the validity of the notice in order that he might know his position in relation to section 23.

F. H. B. W. Layfield for the plaintiff. The enforcement notice is void, since it does not comply with section 23 of the Town and Country Planning Act, 1947. The section requires that the period within which the land must be restored must be capable of extension or, if fixed, must be capable of suspension during the time permitted for appeal.

Denys Buckley for the council. The plaintiff has chosen the wrong method of proceeding: he is not " interested under a deed, " will, or other written instrument " within Ord. 54A, r. 1, since he is concerned to test the validity of the notice and not interested under the notice. Nor is he concerned with any question of construction of the Act which, in any event, would be raised on section 12, which is the interpretation section, and not on section 23. Further, he is not claiming within Ord. 54A, r. 1A, " any legal or equitable right " in property depending on the construction of the statute.

Layfield in reply. Application by originating summons is the appropriate method for determining the validity of the notice. *Mead* v. *Chelmsford Rural District Council* [3] shows that the court of summary jurisdiction and quarter sessions on appeal have no power to decide the matter until it is too late. This is a question of construction, since section 12 is to be read into section 23 and an enforcement notice does affect proprietary rights.

Danckwerts J., after stating the facts, continued: It is contended that the notice is bad, to put it shortly, because it takes no account of the fact that the period within which the notice would take effect might be suspended if there was an appeal against the notice, and in that event the period within which the land was required to be restored by the notice would have expired before the period within which the notice takes effect had come to an end. The object of this application is to get a declaration from the court that that notice fails to comply with the provisions of section 23 of the Town and Country Planning Act, 1947, and is, accordingly, null and void and of no effect. It is claimed that the validity of the notice cannot be decided by the court of summary jurisdiction, or quarter sessions on an appeal against the notice (*Mead* v. *Chelmsford Rural District Council* [1]), and so it is contended that this is a convenient and appropriate method of determining the validity of the notice. The owner of

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[3] [1953] 1 Q.B. 32; [1952] 2 All E.R. 723.

[1] [1953] 1 Q.B. 32, 36, 37; [1952] 2 All E.R. 723.

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the land naturally wants to know his position in relation to section 23 of the Act.

The rule has to be considered to see whether this application falls within it. [His Lordship read Ord. 54A, rr. 1 and 1A, and continued:]

I have come, with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of either of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and it may be true that the question of the validity of the notice depends on the proper construction of the statute, but the jurisdiction conferred by Order 54A is very restricted, and if it does not fall within the terms of the rules, I have no power, whatever I would like to do, to consider the application. I do not think that the plaintiff can be said to be a person "interested under a deed, will, or other written "instrument" within the meaning of rule 1, since he cannot really be interested under a notice; he is merely interested in trying to show that the notice is invalid and does not comply with the Act. Again, with regard to rule 1A, he is not "claiming "any legal or equitable right," which depends upon a question of the construction of the statute. Although there might be a question depending on the true interpretation of section 12 and the exercise by the planning authority of its powers conferred by the Act, it is not, I think, a matter which can be said to be raised by the validity of a notice. Such a notice is merely an enforcement notice served by the planning authority for the purpose of securing compliance with the order of the planning authority because of the failure of the landowner to obtain the necessary permission. It does not seem to me that he is claiming any legal or equitable right which depends on the construction of the statute, and therefore I have most reluctantly come to the conclusion that I am not in a position to entertain this application, and it must be dismissed.

Declaration accordingly.

Solicitors: *Balderston, Warren & Co. for Wild & Son, Whitstable; Sharpe, Pritchard & Co. for R. H. Kealey, Deputy Town Clerk, Whitstable.*

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

C. A.

1958
June 3, 4.

Jenkins, Parker and Pearce L.JJ.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom—Assessments to income tax on life fund interest—Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. I, Sch. D, rules applicable to Case III, r.* 3—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 430—*Double Taxation Relief (Taxes on Income) (Australia) Order,* 1947 (*S.R. & O.,* 1947, *No.* 806), *Sch., art. II* (1) (i) (3); *art. III* (2) (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a branch office in London, in the United Kingdom. For the years 1947–48 to 1953–54 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1] The

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[1] Income Tax Act, 1918, Sch. I, Sch. D: "Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case . . ." R. 3: "(1) Where an assurance company not having its head office in the United Kingdom carries on life assurance business through any branch or agency in the United Kingdom, any income of the company from the investments of its life assurance fund (excluding the annuity fund, if any), wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this Schedule and shall be charged under this Case. (2) Such portion only of the income from the investments of the life assurance fund for the year preceding the year of assessment shall be so charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency in the United Kingdom bears to the total amount of the premiums received by the company: . . . (3) Every such charge shall be made by the special commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners. (4) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sch., art. II: "(1) In the present agreement, unless the context otherwise requires . . . (f) the terms 'United Kingdom resident' and 'Australian resident' mean respectively any person who is resident taxpayer appealed and the special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to notional profits of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that

"in the United Kingdom for the "purposes of United Kingdom tax "and is not a resident of Australia "for the purposes of Australian tax "and any person who is a resident "of Australia for the purposes of "Australian tax and is not resident "in the United Kingdom for the "purposes of United Kingdom tax ". . . (h) the terms 'United King-"'dom enterprise' and 'Australian "'enterprise' mean respectively an "industrial or commercial enterprise "or undertaking carried on by a "United Kingdom resident and an "industrial or commercial enterprise "or undertaking carried on by an "Australian resident; and the terms "'enterprise of one of the territories' "and 'enterprise of the other terri-"'tory' mean a United Kingdom en-"terprise or an Australian enterprise, "as the context requires. (i) The term "'industrial or commercial enterprise "'or undertaking' includes an enter-"prise or undertaking engaged in ". . . the business of . . . insurance, "life insurance or dealing in invest-"ments, and the term 'industrial or "'commercial profits' includes profits "from such . . . business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remunera-"tion for personal services. . . . "(3) In the application of the pro-"visions of the present agreement "by one of the Contracting Govern-"ments any term not otherwise "defined shall, unless the context "otherwise requires, have the mean-"ing which it has under the laws of "that Contracting Government relat-"ing to the taxes which are the "subject of the present agreement."

Art. III: ". . . (2) The industrial "or commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment "situated therein. If it is so "engaged, tax may be imposed on "those profits by the United King-"dom, but only on so much of them "as is attributable to that permanent "establishment: Provided that "nothing in this paragraph shall "affect any provisions of the law of "the United Kingdom regarding the "imposition of excess profits tax and "national defence contribution in the "case of interconnected companies. "(3) Where an enterprise of one of "the territories is engaged in trade "or business in the other territory "through a permanent establishment "situated therein, there shall be "attributed to that permanent estab-"lishment the industrial or commer-"cial profits which it might be "expected to derive in that other "territory if it were an independent "enterprise engaged in the same or "similar activities and its dealings "with the enterprise of which it "is a permanent establishment were "dealings at arm's length with that "enterprise or an independent enter-"prise; and the profits so attributed "shall be deemed to be income "derived from sources in that other "territory. . . ."

Income Tax Act, 1952, s. 430: "(1) Where an assurance company "not having its head office in the "United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com-"pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent pro-"vided in this section, be deemed to "be profits comprised in Schedule D "and shall be charged under Case "III thereof. (2) Such portion only "of the income from the investments article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that the Order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer. Upjohn J. affirmed the determination of the commissioners. On appeal:—

Held, dismissing the appeal, that the taxpayer's taxable surpluses were properly described as "industrial or commercial "profits" for the purposes of the Order of 1947, and the taxpayer was assessable in accordance with article III, paragraphs (2) and (3) of the Schedule to the Order and not under rule 3 of Case III.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388 applied.

Decision of Upjohn J. [1958] Ch. 774; [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305 affirmed.

"of the life assurance fund for the "year preceding the year of assess"ment shall be so charged as bears "the same proportion to the total "income from those investments as "the amount of premiums received "in that year from policy holders "resident in the United Kingdom "and from policy holders resident "abroad whose proposals were made "to the company at or through its "office or agency in the United King"dom bears to the total amount of "the premiums received by the com"pany: Provided that in the case of "an assurance company having its "head office in any part of Her "Majesty's dominions outside the "United Kingdom, in India or in "the Republic of Ireland, the Com"missioners of Inland Revenue may, "by regulation, substitute some basis "other than that prescribed in this "subsection for the purpose of ascer"taining the portion of the income "from investments to be so charged "as being income derived from busi"ness carried on in the United "Kingdom. (3) Every such charge "shall be made by the Special Com"missioners as though the company "had, under this Act, required the "proceedings relating to the charge "to be had and taken before those "Commissioners. (4) Where a com"pany has already been charged to "tax, by deduction or otherwise, in "respect of its life assurance busi"ness, to an amount equal to or "exceeding the charge under this "section, no further charge shall be "made thereunder, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced. (5) Where, by virtue of "this section, an assurance company "is charged under Case III of "Schedule D on a proportion of the "income from the investments of its "life assurance fund or on a basis "substituted therefor, the relief "under section 425 of this Act in "respect of expenses of management "shall be calculated by reference "to a like proportion of its total "expenses of management for the "year, estimated according to the "provisions of this Part of this Act. "(6) Subsection (3) of section 131 "of this Act (which provides that "income chargeable under Case III "of Schedule D may in certain cases "be assessed and charged in one sum) "shall not apply to tax in respect of "income to which subsection (1) of "this section applies."

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Ostime (Inspector of Taxes) v. Australian Mutual Provident Society.

Appeal from Upjohn J.[2]

The Australian Mutual Provident Society, which had its head office in Australia, carried on life assurance business there and, through a branch office, in London.

The question which arose on this appeal was whether the sum of business profits for the years 1947–48 to 1953–54 inclusive arrived at by the calculation prescribed by rule 3 of Case III of Schedule D to the Income Tax Act, 1918, in respect of the five earlier years and section 430 of the Income Tax Act, 1952, in respect of the last two years was an industrial or commercial profit of an Australian enterprise, namely, the taxpayer company, within the meaning of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Relief Order of 1947 was capable of applying to the notional profits of a mutual insurance society) profits attributable to the company's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the company being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The case stated on the appeal from the decision of the commissioners is sufficiently set out in the report below.[3]

On appeal by the Crown, Upjohn J. upheld the determination of the commissioners. The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown. Rule 3 of Case III of Schedule D first creates a notional profit and then imposes a charge to tax on that profit. The question in this appeal is how does that notional sum of profits come within the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947. The Crown's submission is that it does not come within the Order because the notional profit created under rule 3 of Case III is not an " industrial or commercial profit " within the definition of article II (1) (i) of the Schedule to the Order and is, therefore, wholly unaffected by it. As to the nature of the provisions contained in rule 3 of Case III, see *per* Viscount Simon and Lord Wright in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society.*[4] That case cannot be taken to have decided that what is to be charged is business profits, since a mutual insurance society cannot have business profits.

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[2] [1958] Ch. 774; [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305.

[3] [1958] Ch. 774.

In construing the Double Taxation Relief Agreement, which is contained in the Schedule to the Order, the court is entitled to look at the surrounding circumstances: see *per* Lord Blackburn in *Inglis* v. *Buttery.*[5] The relevant surrounding circumstances in the present case are that when the Agreement was signed in October, 1946, which was before the decision of the House of Lords in the *Australian Mutual Provident Society* case,[6] it was the general opinion that rule 3 of Case III provided a yardstick for measuring investment income.

Article II (1) (i) makes a broad distinction between trading income and investment income. The definition of " profit " is directed entirely at the two main headings of trading and investment income and not to a notional profit. Further, article III (3) is concerned only with actual profits and not with notional or fictional profits. The fictional profit created by rule 3 of Case III is not an " industrial or commercial profit " within the meaning of article II (1) (i) at all, and, accordingly, such profit is to be taxed as it would have been before the passing of the Order.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer. The expression " industrial or commercial profit " in article II (1) (i) can fairly be taken to mean business profits, but not including, for example, dividends in the case of a finance house, or rents coming to a property owning company. In rule 3 of Case III of Schedule D the word " profits " is used in contradistinction to investment, since investment income is to " be " deemed profits," that is, business profits: see *Inland Revenue Commissioners* v. *Australian Mutual Provident Society.*[7] There can be no difference in content between industrial and commercial profits under the Order of 1947 and business profits, and, therefore, since there is a conflict between the Order and the rule, the Order must prevail. The Crown's objection to this contention is threefold: (a) It is said that what is charged under rule 3 of Case III are notional as distinct from actual profits. But that is to confuse measure with subject-matter. The Income Tax Act, 1952, assesses the profits arising from the life insurance business carried on by a foreign insurance company in the

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[4] [1947] A.C. 605, 619, 621, 622, 623.

[5] (1878) 3 App.Cas. 552, 577.

[6] [1947] A.C. 605.

[7] Ibid. 617, 619, 621–623.

United Kingdom, and the references to "notional profit" in the *Australian Mutual Provident Society* case[8] are to a term used to denote the conventional method of arriving at the measure; but the subject of the charge is the *actual* profit, that is, business profit.

(b) Then it is said that the House of Lords could not have intended in that case to hold that what are to be charged are business profits, because a mutual insurance society, in the Crown's submission, cannot have business profits. But there is no reason why the legislature should not provide that a mutual society should be deemed to have business profits for tax purposes, that is, the surplus of members' contributions should be deemed to be business profits: see, for example, *Inland Revenue Commissioners* v. *Cornish Mutual Assurance Co.*[9] It is conceded that the language of rule 3 of Case III is not so plain as section 53 of the Finance Act, 1920, but it is submitted that its wording is sufficiently clear to support the above contention.

(c) Finally, it is said for the Crown that whatever be the effect of the decision of the House of Lords in 1947, the Agreement was made in 1946, and that, therefore, it must be construed in the light of the surrounding circumstances, which were that in 1946 it was universally considered that the subject-matter of charge under rule 3 of Case III was dividends and not business profits. There are three answers to that contention: (i) The Agreement must be construed on the same principles as are applicable to the construction of a statute and, accordingly, the surrounding circumstances cannot be considered; (ii) in any event, there was no evidence put forward as to the opinion of the legal profession on this question in 1946 other than what was said arguendo in the *Australian Mutual Provident Society* case.[10] Further, this question should have been presented to the special commissioners in order that they might so find as a fact; (iii) this Agreement is not unique but is one of many similar Agreements, and those which were signed after the decision of the House of Lords in 1947 are in substantially the same terms as the Agreement in question: see, for example, the New Zealand Relief Order, 1947, Ceylon Relief Order, 1950, France Relief Order, 1951, and Switzerland Relief Order, 1955.

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[8] [1947] A.C. 617, 619, 621–628.

[9] (1926) 12 T.C. 841, 850, 867; sub nom. *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* [1926] A.C. 281.

[10] [1947] A.C. 605.

The assessments in question were made under rule 3 of Case III and, were it not for the provisions of the Relief Order, those assessments would stand unchallenged, but the taxpayer comes within the terms of the Order and, accordingly, cannot be taxed on more than its industrial and commercial profits, which, in the circumstances, entails the discharge of these assessments.

Pennycuick Q.C. in reply. The argument for the taxpayer rests on a simple syllogism: (1) The expression " industrial or " commercial profits " in article II (1) (i) means business profits—major premise. (2) The profit chargeable under rule 3 of Case III is a business profit—minor premise. Therefore, (3) the profit charged under rule 3 of Case III is an industrial or commercial profit within article II (1) (i) and, accordingly, the Relief Order applies to it. But, in the Crown's submission, that syllogism contains two equivocations and oversimplifies the position. It is conceded that the expression " industrial or commercial profits " means business profits if it means *actual* business profits. It is the minor premise of the syllogism which is the main issue in the present appeal. What is meant by saying that a rule 3 profit is a business profit? Is it an actual profit of the company's business measured in an artificial way for the purposes of rule 3? It is submitted that rule 3 is not concerned with actual profit.

A proprietary company can make two types of actual profit: (a) trading profit; (b) investment profit. But a mutual society has investment income only: see *per* Lord Macnaghten in *New York Life Insurance Co.* v. *Styles*.[11] It is incapable of making a profit from its trade. But it was nowhere suggested in the *Australian Mutual Provident Society* case[12] that it was the society's surplus income which was the subject of tax under rule 3. Case III creates a purely notional profit, and such a profit does not come within the ambit of the expression " industrial or commercial profit " in article II (1) (i) of the Order.

JENKINS L.J. This is an appeal by the Crown from a judgment of Upjohn J. dated December 20, 1957, whereby he affirmed a determination of the special commissioners dated July 24, 1956, in favour of the present respondents, a company called Australian Mutual Provident Society. The case concerns the effect on the company's tax liability of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The company, and this is important, is a mutual insurance company, which was incorporated in New South Wales in 1849 and is now regulated by certain later Australian statutes. The company has a branch office in London and carries on part of its business here.

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[11] (1889) 14 App.Cas. 381, 411.

[12] [1947] A.C. 605.

I should next refer to some of the income tax provisions relating to insurance companies. Rule 15 of the rules applicable to Schedule D, Cases I and II, in the Income Tax Act, 1918, provides as follows by sub-rule (1): "Where an assurance company carries on life assurance business in conjunction with "assurance business of any other class, the life assurance business "of the company shall for the purposes of this Act be treated as "a separate business from any other class of business carried on "by the company.

Rule 3 of the rules applicable to Case III of Schedule D has an important bearing on this case. [His Lordship read it and continued:] These provisions are those contained in the Income Tax Act, 1918. There are seven years' assessments concerned in the case, from 1947–48 to 1951–52. The Act of 1918 applies to the five earlier years and the Act of 1952 applies to the last two years. There is no material difference between the Act of 1918 and the Act of 1952 for the present purpose, so I can confine my references to the provisions in the Act of 1918.

The relevance of the fact that the company is a mutual insurance concern is this: it is well settled that a mutual insurance company is not liable to tax on its mutual insurance business on the ground that the surpluses arising arise from transactions by the members inter se which are not, for income tax purposes, regarded as a trade carried on by the company. Rule 3 of the rules applicable to Case III of Schedule D was introduced, in fact, in the year 1915 by the Finance Act of that year. As to the provisions of that rule, it was, I think, for some considerable time understood that the effect of it was to provide a mode of ascertaining the proportion of the investment income of the company concerned attributable to its business activities in this country, and the method of calculation laid down is of a kind which one can readily understand as a rough and ready method of arriving at a fair proportion of that income.

The scheme was to take a sum arrived at by ascertaining the proportion of the premium income received in this country to the premium income received throughout the world. That proportion sum produced a figure which, as I have said, was long understood as representing simply a proportion of the income from investments corresponding to the proportion of the business done in the United Kingdom to the whole of the business done.

That view, however, was not accepted by the House of Lords in a case concerning this same company, *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*,[1] which came before the House of Lords early in 1947, judgment having been delivered on March 31 of that year. In that case the dispute was, as I understand it, of this nature: the company had amongst its investments certain investments which were exempt from income tax, and the question was at what stage in the calculation prescribed by rule 3 of Case III of Schedule D allowance ought to be made for these tax-free investments.

The company contended, as I understand it, that the deduction ought to be made from the proportion of income found to be attributable to United Kingdom activities under the provisions of the rule, for it was said that only thus could the company be given the full benefit of the exemption; on the other hand, the Crown's view was that the tax-free investments should be deducted from the totality of investments before applying the calculation to them. The view of the company on this matter, I understand, prevailed in this court, but when the matter came before the House of Lords their Lordships took a radically different view.

This new way of looking at the matter was introduced into the case by an observation made by Viscount Simon in the course of the argument. He said[2]: "Why does the existence of exempted "income affect the application of rule 3? Does the mere fact "that it is included as an item in the computation of the profits "charged under rule 3 amount to charging it with tax? The real "question to be determined is whether, on the true construction "of the rule, there has been any error or mistake in the case of "this society which holds in its life assurance fund investments "exempt from income tax, and further what is the right decision "in view of the fact that the revenue has, in effect, made the "concession that the existence of the exempted income makes a "difference to the calculation."

In the course of his speech Viscount Simon said[3]: "Section "15 of the Finance Act, 1915, was, it would seem, aimed at "meeting this difficulty"—that was the difficulty of taxing insurance companies situate as the respondent company in this case was, that is to say, foreign insurance companies with branches in this country—" and it did so by providing for a conventional " figure, which should be 'deemed to be profits,' comprised in " Schedule D, on which a non-resident life insurance company, " with a branch in the United Kingdom, would make a contribu- " tion to United Kingdom tax, however it arranged its invest- " ments. The provisions now contained in rule 3 of Case III call " for the use of certain factors in order to arrive at this conven- " tional figure, upon which such an assurance company as the " respondent society is required to pay tax in respect of the annual " profit of its life assurance business carried on in this country."

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[1] [1947] A.C. 605; [1947] 1 All E.R. 600.

[2] [1947] A.C. 605, 611.

[3] Ibid. 617.

Then he said[4]: " In the application of rule 3, the thing to be " taxed is not, in whole or in part, exempted receipts, but is a " conventional or notional sum—calculated, it is true, by the use " of figures which might include the proceeds of exempted invest- " ments—but a sum 'deemed to be profits,' to be charged as " such, without any deduction save that provided for in sub- " rule 4."

Again he said[5]: " Once it is accepted that rule 3 of Case III " is not one which taxes income from investments, whether " exempted or not, but one which taxes a conventional sum cal- " culated as the rule directs, it becomes reasonably clear that the " sum to be taxed is not varied by inquiring whether one of the " elements in the calculation contains income from exempted " investments. If variation is required on this ground, it must " be provided by legislation."

Lord Wright said[6]: " The charge was a tax on the investment " income only as a machinery to tax the general profits of the " British business, and as a manner of measuring the charge by " an arbitrary figure derived from a percentage of the investment " income. In this connexion it was not material to distinguish " between exempted and unexempted income. All that was " needed was a yardstick."

There are other observations tending in the same direction elsewhere amongst their Lordships' speeches, but I think those citations will show sufficiently the view they took which was, in effect, that the sum arrived at by applying the calculation provided for by rule 3 of Case III of Schedule D was not a figure conventionally arrived at to represent investment income received by the company and attributed to its activities in this country, but was a figure representing the profit derived by the company from its business in this country. It was conventionally arrived at or notionally arrived at (as it was put in one place by Viscount Simon), but, when arrived at, it was an actual figure for tax purposes, taken as representing for those purposes the profit arising from the company's business in this country.

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[4] [1947] A.C. 605, 619.

[5] Ibid. 620.

[6] Ibid. 622.

It is noteworthy that their Lordships throughout their speeches made no reference at all to the circumstances that inasmuch as this was a mutual insurance company it was not taxable on the profit of its insurance business as distinct from the income of its investments. If the sum so arrived at could be regarded as a figure of investment income conventionally ascertained there would actually be an end of this case, for it will be seen on reference to the Australian double taxation relief agreement that income from investments is excluded from its scope, so, on that view, the position would simply be that the company would be liable to tax on the figure arrived at by the calculation laid down in rule 3 as income from investments and would pay tax accordingly; but, as their Lordships left the matter, there can be no doubt that the figure arrived at under rule 3 must be regarded for tax purposes as being a figure representing business profits and nothing else. In that state of the law the Order came into operation.

The agreement was signed on behalf of the government of this country and of the Commonwealth of Australia on October 29, 1946. The necessary steps to bring it into operation and give it statutory effect were taken as regards this country on April 23, 1947, and, no doubt, corresponding steps were taken by the Australian authorities at or about the same time. So that in March 1947, when judgment was delivered by the House of Lords in the case to which I have referred, the agreement had, in fact, already been signed but had not yet been given statutory effect.

The agreement (one of many agreements of this character) was made under the provisions of section 51 of the Finance (No. 2) Act, 1945, which provided as follows: "(1) If His "Majesty by Order in Council declares that arrangements speci"fied in the Order have been made with the Government of "any territory outside the United Kingdom with a view to "affording relief from double taxation in relation to income tax, "excess profits tax or the national defence contribution and "any taxes of a similar character imposed by the laws of that "territory, and that it is expedient that those arrangements "should have effect, then, subject to the provisions of this "Part of this Act, the arrangements shall, notwithstanding "anything in any enactment, have effect in relation to income "tax, excess profits tax and the national defence contribution "so far as they provide for relief from tax, or for charging "the income arising from sources in the United Kingdom to "persons not resident in the United Kingdom, determining the "income to be attributed to such persons and their agencies, "branches or establishments in the United Kingdom, or determining the income to be attributed to persons resident in the "United Kingdom who have special relationships with persons "not so resident.

"(2) On the making of an Order in Council under this "section with respect to any arrangements relating to a "Dominion as defined for the purposes of section twenty-seven "of the Finance Act, 1920 (which provides for relief in respect "of Dominion income tax), the said section twenty-seven shall "cease to have effect as respects that Dominion except in so "far as the arrangements otherwise provide."

The important words to notice in that section are the words in subsection (1)—". . . then, subject to the provisions of this "Part of this Act, the arrangements shall, notwithstanding "anything in any enactment, have effect in relation to income "tax. . . ." It follows that if and so far as there is any inconsistency between rule 3 of the rules applicable to Case III of Schedule D, on the one hand, and the agreement, on the other hand, then the agreement, having duly been given statutory effect, must prevail over the rule.

I should next refer to some of the provisions of the agreement. It is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Statutory Rules and Orders 1947, No. 806. The body of the Order says, by paragraph 1, that it "may be cited as the Double Taxation Relief (Taxes "on Income) (Australia) Order, 1947," and, by paragraph 2: "It is hereby declared—(*a*) that the arrangements specified in "the agreement set out in the Schedule to this Order have "been made with the Government of Australia with a view "to affording relief from double taxation in relation to income "tax, excess profits tax or the national defence contribution "and taxes of a similar character imposed by the laws of "Australia; and (*b*) that it is expedient that those arrangements "should have effect."

The agreement is set out in the Schedule. [His Lordship referred to the relevant parts of articles II and III and continued:] There is nothing else to which I need refer until article XV, which provides for the commencement of the agreement. The agreement is to have effect when all formalities are completed: "(*a*) in the United Kingdom, as respects income tax "for the year of assessment beginning on April 6, 1946, and "subsequent years;"—and other provisions are made in regard to its having effect as to surtax; and "(*b*) in Australia, as "respects tax for the year of tax beginning on July 1, 1946, and "subsequent years."

The question in the case may be expressed as being whether the sum of business profits (as I have termed it) arrived at by the calculation prescribed by rule 3 of the rules applicable to Case III of Schedule D is an industrial or commercial profit of an Australian enterprise, namely, the respondent company, within the meaning of the Double Taxation Relief Agreement. If it is, then the result would appear to be that the company can claim to be assessed in accordance with the provisions of paragraphs (2) and (3) of the third article of the agreement and cannot properly be assessed to tax on the sum arrived at by the calculation prescribed by rule 3.

On the Crown's side it is contended that, although actual business profits are by definition "industrial or commercial "profits" for the purposes of the double taxation relief agreement, the rule 3 sum of business profits has nothing whatever to do with the provisions of that agreement. It is, argues Mr. Pennycuick, a purely notional sum. It has no substratum of fact. It is not a sum arrived at by a conventional calculation but, when so arrived at, representing actual profit. It is a purely notional sum; and he contends that the agreement is concerned with actual profits; though they may be artificially estimated in accordance with income tax principles, actual profits there must be. He says that the true view is that the company's liability to tax under rule 3 of Case III on the sum of business profits arrived at by the rule 3 calculation is wholly outside the agreement and that the company remains liable to tax upon it.

In my view that contention should not be accepted. It appears to me that for the present purpose it does not greatly matter whether the sum of profit referred to in rule 3 is to be regarded as an actual or notional sum. The purport of the rule, as I understand the construction placed upon it by the House of Lords, is to impute to an establishment (operating here) of a foreign insurance company a sum representing the profits arising to that company from its life insurance business in the United Kingdom. That is the object of it and to carry out that object it applies the proportion formula. On the other hand, the agreement (which, as I have mentioned, must be taken to override the Act where the two conflict) provides in paragraph (3) of article III its own method of estimating and arriving at the profit arising to an Australian company (including an insurance company) from its business (including life insurance business) in the United Kingdom.

The system adopted in rule 3 is a rough and ready method of taking the proportion to which I have referred. The system prescribed by the agreement is of a far more elaborate and detailed character; but both, in the case here relevant of an Australian company carrying on life insurance business in this country, aim at the same object, which they seek to achieve by different means. It may be that the figures arrived at by applying one or other of the two formulae would be widely different, but, in my view, the agreement must prevail by the terms of the Act under which it was made.

It follows from that that for the purpose of assessing this company to tax for the years in question on the profits of its business in the United Kingdom one may completely ignore rule 3 and the figure arrived at by applying the calculation laid down in that rule. The company's liability is to be measured in accordance with the agreement and not otherwise.

What the effect of applying the agreement in substitution for rule 3 may be it is not for me to say. It may be that it will be found that the fact that this is a mutual society will result in the liability being reduced to nil; on the other hand, one can see that there might be room for argument to the effect that the various hypotheses postulated by paragraph (3) of article III of the agreement might, when applied, involve the assumption that the company was not a mutual company; but questions of that kind do not concern us at this stage and I would prefer to say nothing about them.

The case has been most elaborately argued. I have confined myself, in effect, to one aspect of it which appears to me to be decisive in favour of the company, but I intend no disrespect to the careful and elaborate argument presented. In the result I see no reason at all to disturb the concurrent views of the special commissioners and the judge and I would dismiss this appeal.

Parker L.J. I agree. The short though difficult question in this case is whether the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, applies in the circumstances of this case. If it does not, then it is clear—and, indeed, it is conceded—that the seven assessments in this case, five made under rule 3 of Case III of the Income Tax Act of 1918 and two under section 430 of the Act of 1952, are valid assessments; if, on the other hand, it does apply, then, by virtue of section 51 of the Finance (No. 2) Act, 1945, the measure of liability under the Relief Order prevails and supersedes the liability under rule 3 of Case III and, accordingly, the seven assessments in question must be discharged.

The Relief Order in effect provides that none of the enterprises there referred to shall be taxed in the United Kingdom unless certain conditions are fulfilled. The first is that it must be an enterprise of the type laid down in the Relief Order, and the Relief Order provides that one of the enterprises in question shall be one carrying on the business of life insurance; accordingly, albeit that the company in this case is a mutual society, it is clearly an enterprise within the Order. Secondly, that enterprise must have a permanent establishment in the United Kingdom, and there is no doubt that this company had. The third condition is that what may be taxed are only profits from the activities or business of that enterprise, not including income in the form of dividends, interest, etc. The sole question really in this case is whether the profits on which the company were assessed to tax are profits within that Relief Order.

I am afraid that for my part I am conscious of the inability fully to understand the decision of the House of Lords in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society* [7] but, be that as it may, it is a decision clearly binding upon this court. As I understand it, their Lordships were there construing rule 3 of Case III as providing that a certain proportion of the investment income of such a company as this should be deemed to be the business profits of that company and that, be it observed, whether the company in question was a proprietary company or a mutual society as, indeed, was the case before the House of Lords.

If that be right, then, albeit that they were deemed to be business profits, it seems to me that those profits so deemed come within and come plainly within the words of the Relief Order. I would add this: that it does seem to me that, in so far as one can look at the surrounding circumstances and the intention of the parties, that must have been their intention. For more than 40 years before the agreement incorporated in the Relief Order was made a foreign enterprise such as this was not taxed under Case I of Schedule D but under rule 3 of Case III.

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[7] [1947] A.C. 605.

As Viscount Simon put it in the case in the House of Lords to which I have referred[8]: "It is true that the company might be "regarded as carrying on in this country a trade through its "branch, but there was much practical difficulty in arriving at "the figure under Case I of Schedule D of annual profits of such "a branch for, in the case of life assurance business, the true "profits attributable to the branch could not be ascertained in the "normal manner, as is shown by provisions in the Assurance "Companies Act, 1909, for a quinquennial valuation. Section 15 "of the Finance Act, 1915, was, it would seem, aimed at meeting "this difficulty, and it did so by providing for a conventional "figure, which should be 'deemed to be profits,' comprised in "Schedule D on which a non-resident life assurance company, "with a branch in the United Kingdom, would make a contribution to United Kingdom income tax, however it arranged its "investments. The provisions now contained in rule 3 of Case "III call for the use of certain factors in order to arrive at this "conventional figure, upon which such an assurance company "as the respondent society is required to pay tax in respect of the "annual profit of its life assurance business carried on in this "country."

That being so, it being the case that for some 40 years taxation of a life insurance company under Case I of Schedule D was to all intents a dead letter, one arrives at this: That, if the Crown's argument is right, the inclusion in the Relief Order of an enterprise carrying on the business of life insurance would have been there for purely theoretical interest in that only theoretically and not practically did such a life insurance company earn actual trading profits liable to tax.

For these reasons and the reasons given by my Lord I would dismiss this appeal.

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[8] [1947] A.C. 605, 617.

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1958

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

PEARCE L.J. I agree with what my Lords have said and I have nothing to add.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Inland Revenue; Bell, Brodrick & Gray.*

J. A. G.

In re TAPP.
GONVILLE AND CAIUS COLLEGE, CAMBRIDGE *v.* INLAND REVENUE COMMISSIONERS.

[1958 T. No. 467.]

C. A.
1959
Feb. 13, 16, 17, 18; *Mar.* 16.

Jenkins, Romer and Ormerod L.JJ.

Revenue—Estate duty—Annuity—Successive annuities—Continuing annuity—Annuity payable to such of three persons as should be living—Death of one annuitant—Property passing—Whether continuing annuity—Duty, how assessed—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*), 7 (7).

A testator, who died in 1936, by clause 9 of his will directed his trustees to pay out of the income of his residuary estate "the sum "of £3,000 per annum to my sister A. my nephew T. and my "niece F. or such one or more of them as shall for the time being be "living and if more than one of them shall be living to be received "by them in equal shares."

The sister died in 1937 and her third share of the annuity accrued to the testator's nephew and niece. The nephew died in 1956 and the Estate Duty Office claimed duty on his death under sections 2 (1) (*b*) and 7 (7) (*b*) of the Finance Act, 1894,[1] on the

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[1] Finance Act, 1894, s. 1: "In "the case of every person dying "after the commencement of this "part of this Act, there shall . . . be "levied and paid, upon the principal "value . . . of all property . . . "which passes on the death of such "person a duty, called 'Estate "'duty.'"

S. 2 (1): "Property passing on "the death of the deceased shall be "deemed to include . . . (*b*) Property "in which the deceased or any other "person had an interest ceasing on "the death of the deceased, to the "extent to which a benefit accrues "or arises by the cesser of such "interest. . . ."

S. 7 (7): "The value of the bene-"fit accruing or arising from the "cesser of an interest ceasing on "the death of the deceased shall— "(*a*) if the interest extended to the "whole income of the property, be "the principal value of that property; "and (*b*) if the interest extended to "less than the whole income of the "property, be the principal value of "an addition to the property equal "to the income to which the interest "extended."

"slice" of the capital of the trust fund producing the £1,500 a year, being the half share of the annuity which had been payable to the deceased nephew. The trustees of the will contended that estate duty was payable under section 1 upon the actuarial value for the life of the niece of the £1,500 a year which accrued to her:—

Held, (1) that on the true construction of the will the annuity given by clause 9 was a continuing annuity of £3,000, and that on the death of the nephew the annuity did not cease but continued to be payable with the difference that the half share, which had been payable to the deceased during his life, became payable to the niece as the last survivor of the three named beneficiaries.

(2) That accepting the principle laid down in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270, with regard to the respective functions of sections 1 and 2 of the Finance Act, 1894, a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession, or to several persons, and the survivors or survivor of them constituted property capable of passing on the death of each successive taker, other than the last, and that the annuity given by clause 9 passed within the meaning of section 1 and, accordingly, duty was payable on the actuarial value at the death of the deceased of an annuity of £1,500 payable during the residue of the life of the surviving annuitant.

In re Cassel [1927] 2 Ch. 275; 43 T.L.R. 743 and *In re Duke of Norfolk* [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664 followed.

In re Austin Motor Co. Ltd.'s Policies. In re Payton [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425 distinguished.

In re Weigall's Will Trusts [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312 disapproved.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

William Munro Tapp (hereinafter called "the testator") by clause 9 of his will dated June 16, 1933, directed his trustees to hold the trust fund, representing his net residuary estate, upon trust out of the income (after the death of his wife, who predeceased him), to pay "the sum of £3,000 per annum to "my sister Catherine Alway my nephew Arthur Gerard Sentance "Tapp and my niece Phyllis Fawell or such one or more of "them as shall for the time being be living and if more than "one of them shall be living to be received by them in equal "shares," and he gave the balance of the income of the trust fund to the Master & Fellows of Gonville and Caius College in the University of Cambridge.

The testator by a codicil dated September 23, 1935, made in contemplation of his second marriage, confirmed the provisions in his will with regard to the annual payment of £3,000.

The testator died on January 23, 1936. His sister Catherine Alway died on June 29, 1937. On her death estate duty was claimed and paid on the actuarial value of the annual sum of £1,000, being one third of the annuity of £3,000, which on her death accrued to Arthur Gerard Sentance Tapp and Phyllis Fawell. Arthur Gerard Sentance Tapp (hereinafter called "the "deceased") died on July 31, 1956. On his death the Estate Duty Office claimed duty under sections 2 (1) (*b*) and 7 (7) (*b*) of the Finance Act, 1894, on the "slice" of the capital of the trust fund producing £1,500, being the half share of the annuity which had been payable to the deceased during his life.

By this summons the trustees of the testator's will asked whether estate duty became payable on the death of the deceased under section 1 of the Finance Act, 1894, upon the value at that date of a continuing annuity of £1,500 per annum for the remainder of the life of Phyllis Fawell; or under section 2 (1) (*b*) on the capital value of the proportion of the residuary estate required to produce an annuity of £1,500. The defendants to the summons were the Inland Revenue Commissioners and Phyllis Fawell.

Danckwerts J. held that estate duty was payable under section 1 of the Act of 1894 on a one-half share of a continuing annuity of £3,000 for the life of Phyllis Fawell.

The Crown appealed. The grounds of appeal were: (1) That for estate duty to become payable under section 1 of the Act of 1894 there must be some item of property, identifiable and persisting independent of the beneficial interests therein, which existed both before and after the death of the deceased. (2) That the question whether in any particular case there was such an identifiable item of property depended upon the result in law of the provisions contained in the instrument under which the interest of the deceased arose and not merely on the language therein contained. (3) That where a testator directed payment of an annual sum to two or more persons successively, such annual sum did not exist as an identifiable item of property. (4) That the only property to which the deceased was entitled immediately prior to his death were the rights conferred upon him by the will, namely, the right during each year of his life, so long as the defendant Phyllis Fawell was living, to receive out of the testator's estate the sum of £1,500, and the right in each year of his life after the death of Phyllis Fawell to receive out of the testator's estate the further sum of £1,500, and each of such rights came to an end and did not pass on his death. (5) That, if as Danckwerts J. held, *In re Duke of Norfolk* [2] decided that a testator who gave an annual sum to two persons successively thereby created a continuing item of property which passed under section 1 of the Finance Act, 1894, on the death of the first taker of the annual sum, such decision was given per incuriam and ought not to be followed in the Court of Appeal.

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown. The question is whether estate duty is payable under section 1 or under section 2 (1) (*b*) of the Finance Act, 1894, that is, whether there is a passing under section 1 or a cesser of an interest under section 2 (1) (*b*). The Crown contends that section 2 (1) (*b*) applies. If section 1 applies, duty is payable on the actuarial value of the annuity of £1,500 for the life of Phyllis Fawell. If section 2 (1) (*b*) applies, duty is payable under section 7 (7) on the slice of the capital required to produce the deceased's annuity valued in accordance with the provisions of section 7 (7).

For there to be a passing under section 1, there must be some item of property which is identifiable and which passes independently of the beneficial interest. Here there is not any such item of property which existed both before and after the death of the deceased. Where what the deceased had was merely a chose in action, without any interest in the property held by the trustee, there is a cesser under section 2 (1) (*b*). The decision in *In re Duke of Norfolk* [2] is distinguishable from this case. In this case the trust property is vested in the trustees. No annuity is given to them. Each beneficiary, who survives, has a right to payment of a share of £3,000 a year. That is a right to a chose in action. Apart from the right to payment, there is no separate item of property which passes. When each beneficiary dies the chose in action ceases. There is nothing which survives. The first four grounds of appeal are established by *In re Austin Motor Co. Ltd.'s Policies. In re Payton* [3] and *In re Weigall's Will Trusts*,[4] where the decision in *In re Duke of Norfolk* [5] was distinguished. In the *Norfolk* case [5] it was conceded that the annuity in question was a continuing annuity. The distinction between the *Norfolk* case [5] and the *Payton* case [6] is that an annuity cannot of itself be a separate item of property. The question is whether or not there is a right of property which exists independently of the interests in it. Here there is no annuity vested in the trustees in which the beneficiaries have an interest. What each beneficiary has is a chose in action, a right of payment of £1,000 a year out of income. In the *Norfolk* case [7] an annuity had been created which was vested in trustees and then settled. The annuity there existed independently of the beneficial interests in it. If a beneficial interest in such an annuity ceased, the annuity did not cease as well. Here the trust is for the payment of £1,000 to each beneficiary. No annuity exists independently of the direction to pay. An example of a continuing annuity is an annuity payable for 50 years to one for life, with trusts over. Then there would be a passing on the death of the beneficiary entitled for life: see *In re Cassel*.[8] The test is whether there is a right of property which exists independently of the interests in it. Here the annuitants had no right independently of the right to payment.

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[2] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[3] [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425.

[4] [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312.

[5] [1950] Ch. 467.

[6] [1951] Ch. 1081.

E. Blanshard Stamp following. Starting from the decision in *In re Payton*,[9] for section 1 to apply there must be some property which passes. The answer of the trustees to the question what was the property which passed in this case under section 1 is that the property which passed was an annuity of £3,000 of which the deceased had half. It is submitted that here there was no such thing in law as an annuity of £3,000. No one had a right to £3,000. If the trustees had stopped paying, no one could have brought an action for breach of trust in respect of the sum of £3,000. If one of the beneficiaries had released his interest, an annuity of £3,000 per annum would not have remained in existence. It is not possible to have an annuity in vacuo. It is a queer form of property which ceases to exist if one of the persons interested in it releases his interest. It is necessary to find someone who was entitled to this annuity of £3,000. There was no person entitled to require that annuity to be paid. The legal effect of a direction to divide £3,000 a year between two persons in equal shares is to create two annuities.

For there to be liability for duty under section 1, there must be an identifiable item of property existing before and after the death: *In re Payton*.[10] Whether there is or is not such an item of property must be determined by reference to the terms of the trust instrument. No one suggests that the trust fund passed

[7] [1950] Ch. 467.

[8] [1927] 2 Ch. 275; 43 T.L.R. 743.

[9] [1951] Ch. 1081.

[10] Ibid.

on the deceased's death. There was the beneficial right vested in the deceased to have £1,500 a year out of the income of the trust fund so long as he lived. Technically, that right was a chose in action. The right was personal to the deceased, and when he died no interest in it passed to Phyllis Fawell. In addition, he had a contingent right, if Phyllis Fawell predeceased him, to another £1,500 a year. This could not be property vested in him and which passed to her on his death. Looking at the matter from the point of view of Phyllis Fawell, before the deceased died she had the right to £1,500 a year during her life and a right to a further £1,500 a year if the deceased predeceased her. The right to the further £1,500 was conferred by the will and all that happened was that, when the deceased died, the right which had, until that moment, been contingent, became vested. Her rights after the deceased's death were those which she had always had in the property and the property in no sense passed from the deceased to her. Her rights were quite separate from his. £1,500 was payable to him only for life and came to an end on his death, and another right then arose in Phyllis Fawell to another £1,500 a year. The separate rights are spoken of as an annuity of £3,000 a year simply for convenience. This case is not like the *Duke of Norfolk's* case,[11] where the trustees had a right to the annuity during the life of the survivor of two beneficiaries.

Until *In re Payton* [12] an annuity payable to A for life and afterwards to B was regarded by the Estate Duty Office as identifiable property which passed on A's death to B; but after that case the practice was altered and the alteration was confirmed by *In re Weigall's Will Trusts.*[13] There is here no continuing right to receive £3,000 during the whole period of the joint lives of the deceased and Phyllis Fawell and the survivor of them. No item of property consisting of the right to £1,500 passed on the deceased's death. In *In re Cassel* [14] the right was not vested in the annuitant as it is here; the life tenant inevitably got the benefit in that case of the continuing item of property. That decision was distinguished in *In re Weigall's Will Trusts* [15] on that ground. This case is in line with *In re Payton.*[16]

It may be relevant to consider what would happen if the other persons entitled released their rights. If Phyllis Fawell had released her right the deceased would only have been entitled to his £1,500, and the right to £3,000 a year would have ceased to exist. If, on Phyllis Fawell releasing her right, the deceased had become entitled to the whole sum, it might well have been contended that this was a joint annuity. Disclaimer in this case would operate as a surrender and not as an assignment. Phyllis Fawell could have assigned to a third party the right to receive £1,500 a year out of the income of the estate during the residue of her life, but she could not prejudice accruer. She could only assign the equitable interest during her life and not something which could accrue to the deceased on her death. There is authority that where an annuitant dies and another annuity of a different amount comes into existence, duty has to be paid on the whole sum: *Lord Advocate* v. *Maclachlan.*[17]

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[11] [1950] Ch. 467.

[12] [1951] Ch. 1081.

[13] [1956] Ch. 424.

[14] [1927] 2 Ch. 275.

[15] [1956] Ch. 424.

[16] [1951] Ch. 1081.

John Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the trustees. The *Norfolk* case [18] was distinguished in *In re Payton* [19] on a ground which does not touch this case. In the present case there was an express gift of an annuity of £3,000, to continue during the lives of three named persons and the survivor or survivors of them, to be paid to the three and to the survivors if more than one in equal shares. The same result would have been achieved by a bequest of three annuities of £1,000 to each of the named beneficiaries, with cross-remainders between them. This was a continuous sum charged on property to be enjoyed by persons in succession. In the *Norfolk* case [20] the ratio decidendi was that such an annual sum charged on trust property constituted an item of property which passed under section 1 from one annuitant to another. The Crown have sought to distinguish the *Norfolk* case [20] on the ground that in that case the continuing annuity was given in terms to the trustees of the will to be applied by them, whereas here it was given direct to the annuitant. It would be odd if liability to duty depended on whether the testator had in terms given an annuity first to an annuitant or to trustees, and it is submitted that there is no distinction between the two forms of limitation. Neither creates any form of property apart from the annuitant's right to receive the annuity. In *Cassel's* case [21] there was no gift to the trustees as there was in the *Norfolk* case,[22] but no significance was attached to that in the judgment. In *In re Payton* [23] the Court of Appeal refused to accept the argument that the annuity given to the trustees and held on trust by them was a continuing property. If the right of two persons to enjoy an annuity in succession constitutes an item of property capable of passing under section 1, then section 2 (1) (*b*) is excluded. The ratio of the *Norfolk* case [24] applies to every similar case of a continuing annuity. In the *Cassel* case [25] the annuitant had a variable sum out of the residuary estate which was directly applicable by the trustees for repairs. The argument there for the Crown was exactly what Mr. Stamp has put today and it was rejected. No suggestion was made that there was any form of property except the beneficial right of enjoyment and the residuary estate out of which the annuity fell to be paid. It has not been suggested that the fiduciary obligation of the trustees to apply the income in furtherance of the trust was an item of property. That decision was fully considered and approved in *In re Duke of Norfolk*.[26] [Reference was made to *Inland Revenue Commissioners* v. *Crossman*.[27]]

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[17] (1899) 1 Fraser 917; 36 S.L.R. 727.

[18] [1950] Ch. 467.

[19] [1951] Ch. 1081.

[20] [1950] Ch. 467.

[21] [1927] 2 Ch. 275.

[22] [1950] Ch. 467.

[23] [1951] Ch. 1081.

It was accepted by the Crown in the *Norfolk* case [28] that there was such a thing as a continuing annuity and that the testator had expressed himself so as to give one. It was part of the ratio decidendi of the Court of Appeal that such a continuing annuity is an item of property and can and does as such pass under section 1. That is a binding decision, although one party did not advance the particular argument which might have been put. It affirmed *Cassel's* case,[29] where the argument that there was no such property was put. In *In re Payton* [30] the property was a contractual right against an insurance company; there was no underlying estate. The court rejected the argument that the contractual right was a piece of property passing from one person to another. The *Norfolk* case [31] was distinguished, but not doubted. *In re Payton* [32] is an affirmation of the *Norfolk* case [33] in so far as it concerns an annuity payable out of trust property. The trusts in the present case are indistinguishable from those in that case apart from the gift to trustees of a term of years. *Hart* (*Inspector of Taxes*) v. *Sangster* [34] turns on a different point —that an annuity is not changed to a different annuity because of changes in security.

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[24] [1950] Ch. 467.

[25] [1927] 2 Ch. 275.

[26] [1950] Ch. 467.

[27] [1937] A.C. 26; 52 T.L.R. 415; [1936] 1 All E.R. 762.

[28] [1950] Ch. 467.

[29] [1927] 2 Ch. 275.

[30] [1951] Ch. 1081.

[31] [1950] Ch. 467.

[32] [1951] Ch. 1081.

[33] [1950] Ch. 467.

[34] [1957] Ch. 329; [1956] 1 W.L.R. 1105; [1956] 3 All E.R. 52.

[Romer L.J. Is this a question of construction?]

It depends on the nature of the beneficial rights arising on a proper construction of the instrument. The instrument has to be construed to find what rights are created; the actual " labels " used are immaterial. In *Weigall's* case[35] Harman J. was wrong in holding that the interest was not a continuing annuity. On a proper construction and the true effect of the will in that case he was bound by *Norfolk's* case,[36] and he wrongly distinguished it.

Sir Lynn Ungoed-Thomas Q.C. in reply. The difficulty is whether this is a continuing annuity. *Norfolk's* case[36] was based on the concession that there was a continuing annuity. It does not really matter whether the concession was right, though it is submitted that it was. It is significant that the trustees had a term appointed to them. The term was created in them and was not just security for the annuity. The annuity was independent of the beneficial interests in the property. The protective trusts indicate that the annuity existed in the trustees independently of the life tenant's beneficial interest. That point was made clear in *In re Payton.*[37] Here there is no annuity apart from the beneficial interest in the beneficiaries themselves.

[Ormerod L.J. Neither was there in *Cassel's* case.[38]]

In *Cassel's* case[38] the obligation of the trustees existed independently of the beneficial interest of anyone in the property. The general proposition that if there is an annuity in A and B, the right to receive it as an identifiable item of property cannot stand in view of *In re Payton.*[39] One cannot describe a beneficial interest otherwise than as a right to receive. In the *Norfolk* case[40] there was nothing more or less than a right to receive. The beneficial interest is itself the right to receive. An annuity can be a right to property as much as anything else. It must be independent of the right to receive it.

[Jenkins L.J. An annuity must be payable to someone if it exists at all—so that in a sense it never can exist apart from the beneficial interest.]

The crux of the matter is whether the right to receive exists in the beneficiary as an independent item of property. Here the right cannot exist independently, because the right to receive is itself the sole beneficial interest. The practice has now changed because of *In re Payton.*[41] One must find property passing independently of the beneficial interest. There is no distinction between the case of an annuity arising out of a trust and one in contract.

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[35] [1956] Ch. 424.
[36] [1950] Ch. 467.
[37] [1951] Ch. 1081.
[38] [1927] 2 Ch. 275.
[39] [1951] Ch. 1081.
[40] [1950] Ch. 467.
[41] [1951] Ch. 1081.

Cur. adv. vult.

March 16. JENKINS L.J. read the following judgment of the court.

This is an appeal by the Commissioners of Inland Revenue from a judgment of Danckwerts J. dated July 29, 1958, in proceedings brought against them by the present trustees of the will of William Munro Tapp, deceased, for the determination by the court of a question concerning the estate duty payable on the death of Arthur Gerard Sentance Tapp (hereinafter called " the " deceased ") in respect of his interest under a trust contained in the testator's will for the payment out of the income of the trust fund thereby constituted of an annuity of £3,000 to three named beneficiaries, including the deceased (who was the second of the three to die), or such one or more of them as should for the time being be living, and if more than one in equal shares.

The question in the appeal is whether, having regard to the terms of this trust, there was, on the death of the deceased, a passing under section 1 of the Finance Act, 1894, of property, in the shape of the share original and accruing of the annuity to which he was entitled at the time of his death, and which then became payable for life to the last survivor of the three named beneficiaries, to be valued actuarially as at his death; or whether such share constituted an interest ceasing on his death in property in the shape of the trust fund out of the income of which the annuity was payable, so as to give rise to a notional passing under section 2 (1) (*b*) of a " slice " of the capital of the trust fund to be valued in accordance with section 7 (7) (*b*).

The will is dated June 16, 1933. The testator's wife named in the will died in his lifetime. After her death he married again and in contemplation of such remarriage he made a codicil dated September 23, 1935, by which (so far as material for the present purpose) he confirmed his will. The testator died on January 23, 1936, and his will and codicil were duly proved on May 7, 1936.

The only provisions of the will to which it is necessary to refer for the present purpose are those contained in clause 9. By that clause the testator made a general residuary devise and bequest to his trustees upon trusts for conversion and investment and directed his trustees to hold the resulting investments and the investments from time to time representing the same (thereinafter referred to as his trust fund) upon trust to pay out of the income thereof to his wife Kate Garrett Tapp (who predeceased him) during her life the annual payment therein mentioned " and " out of the remainder of such income to pay the following annual " payments videlicet (a) the sum of £1,500 per annum during " the life of my said wife Kate Garrett Tapp and after her death " the sum of £3,000 per annum to my sister Catherine Alway my " nephew Arthur Gerard Sentance Tapp " (the deceased) " and " my niece Phyllis Fawell or such one or more of them as shall " for the time being be living and if more than one of them shall " be living to be received by them in equal shares."

Catherine Alway died on June 29, 1937, and it is interesting to note that, in accordance with the official practice then followed, for which support is to be found in *In re Cassel* [1] and *In re Duke of Norfolk* [2] (in the Court of Appeal), estate duty was claimed and paid on her death under section 1 of the Act upon the actuarial value for the lives of the deceased and Phyllis Fawell and the survivor of them of the one-third share (namely, £1,000 per annum) of the annuity of £3,000 which then accrued to the deceased and Phyllis Fawell for their joint lives and the life of the survivor of them under clause 9 of the will.

The deceased died on July 31, 1956, and thereupon the Estate Duty Office, reversing their previous practice on the strength of the decisions in *In re Payton* [3] and *In re Weigall's Will Trusts*,[4] claimed duty on his death under sections 2 (1) (*b*) and 7 (7) (*b*) of the Act on the " slice " of the capital of the trust fund producing the half-share (namely, £1,500) of the annuity which had theretofore been payable to the deceased during his life.

The trustees took the view that the less onerous method of assessment, adopted in the case of Catherine Alway, was right, and should be followed in the case of the deceased. The Estate Duty Office, however, maintained their claim under sections 2 (1) (*b*) and 7 (7) (*b*), and the present proceedings ensued.

The trustees, relying upon *In re Cassel* [5] and *In re Duke of Norfolk*,[6] contend that the trust declared by clause 9 of the will created one single and continuing annuity payable out of the income of the trust fund during the period until the death of the

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[1] [1927] 2 Ch. 275; 43 T.L.R. 743.

[2] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[3] [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425.

[4] [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312.

[5] [1927] 2 Ch. 275.

[6] [1950] Ch. 467.

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last survivor of the three named beneficiaries, and that, on the death of the deceased, there was a passing, within the meaning of section 1 of the Act, of the share (namely, one-half) of that continuing annuity to which he was entitled at his death from his beneficial enjoyment to that of Phyllis Fawell. If that view is right, then it is common ground that the estate duty payable on the death of the deceased should be charged under section 1 on the principal value of the property so passing, that is to say, the principal value actuarially ascertained as at the death of the deceased of an annuity of £1,500 per annum for the life of Phyllis Fawell, as the last survivor of the three named beneficiaries.

The Commissioners of Inland Revenue, on the other hand, relying on *In re Payton*[7] and *In re Weigall's Will Trusts*,[8] contend that there was in this case no passing of property on the death of the deceased within the meaning of section 1. They make this submission on the ground that, having regard to the terms of this particular trust, the annuity was not for estate duty purposes property at all, but a mere chose in action or collection or series of choses in action which could have no existence as property apart from the beneficial interests therein. According to this argument, as we understand it, on the death of Catherine Alway her right to receive one-third (or £1,000 per annum) of the annuity ceased, and a like proportion of the annuity ceased with her right to receive it, leaving nothing which could pass on her death, because her part of the annuity, and her right to receive it, were in truth one and the same thing. The subsequent division, in accordance with the trust, of the part of the annuity which had been payable to Catherine Alway between the deceased and Phyllis Fawell in equal shares is on this view accounted for as due to a new and distinct right, springing up in them on Catherine Alway's death, to the receipt during their joint lives in equal shares of a yearly sum equal to the yearly sum theretofore payable to Catherine Alway. Similarly, it is claimed that on the death of the deceased his right to receive one-half (or £1,500) of the annuity, and with it a like proportion of the annuity, ceased, and a new and distinct right sprang up in Phyllis Fawell to receive during the remainder of her life a yearly sum equal to the yearly sum theretofore payable to the deceased. It follows, in the commissioners' submission, that the relevant provisions of the Act are to be found in sections 2 (1) (*b*) and 7 (7) (*b*). In their submission, the effect of the trust for duty purposes was to confer on the deceased "an interest "ceasing on [his] death," in the shape of his share original and accruing of the annuity, in "property" in the shape of the trust fund out of the income of which the annuity was payable, and that, accordingly, this property is to be deemed by virtue of section 2 (1) (*b*) to have passed on the death of the deceased "to "the extent to which a benefit accrues or arises by the cesser "of such interest." It is common ground that, if this view is right, the value for duty purposes of the benefit accruing or arising from the cesser of the deceased's interest must under section 7 (7) (*b*) be taken as being "the principal value of an "addition to the property" (that is, the trust fund under the will) "equal to the income to which the interest extended."

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[7] [1951] Ch. 1081.

[8] [1956] Ch. 424.

By the judgment under appeal the judge made a declaration to the effect that duty was, as contended by the trustees, payable under section 1 of the Act on the value at the death of the deceased of a one-half share in a continuing annuity of £3,000 per annum for the remainder of the life of Phyllis Fawell as the last survivor of the three named beneficiaries.

The judge regarded himself as bound so to hold by the authority of *In re Duke of Norfolk.*[9] The commissioners contend that he ought to have followed *In re Payton*[10] in preference to *In re Duke of Norfolk*,[11] and by doing so to have reached a contrary conclusion.

We should next refer to the four cases already noticed, beginning with *In re Cassel.*[12] In that case a testator bequeathed "Brook House and contents" and the stables held therewith, the premises being held on leases expiring in 1995, to trustees for successive tenants for life and directed that "the rents outgoings "rates and taxes for the time being payable in respect of the "premises and keeping the same and the contents thereof insured "against fire and burglary and in a proper state of preservation "should always be paid by my trustees out of the income of my "residuary personal estate." On the death of the first tenant for life, the question arose whether the varying periodical payments falling to be made out of income under the above-stated direction attracted estate duty under section 1 of the Act, on the ground that there was a passing within the meaning of that section of property in the shape of the benefit of the annual sum payable in accordance with the direction above stated, or under section 2 (1) (*b*), on the ground that they constituted for the

[9] [1950] Ch. 467.

[10] [1951] Ch. 1081.

[11] [1950] Ch. 467.

[12] [1927] 2 Ch. 275.

purposes of that section an interest ceasing on the death of the deceased tenant for life. Russell J. considered himself bound by *Earl Cowley* v. *Inland Revenue Commissioners*,[13] though against his own inclination, that the case before him was one in which there was a passing within the meaning of section 1, with the result that that section must be applied to the exclusion of section 2 (1) (*b*). Having thus reached the conclusion that section 1 was applicable, Russell J. said[14]: "What then is "the property which passes on Mrs. Cassel's death? In my "opinion the true answer is the benefit of the annual sum payable under the special clause. I have already in my previous "judgment indicated the nature of this provision. Its duration "is for a term which must expire in 1995. It may expire earlier "if Brook House is sold; but in view of the benefits conferred "by the special clause this event, though possible, is improbable. "In substance, the trustees are bound for a period of time to "apply an annual sum of varying amount for the benefit of the "person for the time being entitled under the will to the enjoyment of Brook House and contents. What passes is the right "to enjoy the benefit of that annual sum. That is the property "which passed on the death of Mrs. Cassel."

In *In re Duke of Norfolk*[15] there was a devise of freehold hereditaments to the testator's wife, as his sole executor and trustee, for a term of 1,000 years on trust to pay out of the income thereof any annuity or annuities bequeathed by him, followed by a bequest to her as such sole executor and trustee of an annuity of £2,000 to commence from his death and to continue to be payable during the joint lives of two named persons (who were father and son) and the life of the survivor of them, and to be paid to the father during his life and after his death to the son, subject in both cases to certain protective trusts. On the death of the father in the lifetime of the son, a question comparable to the question now in issue arose in regard to the estate duty payable in respect of this annuity.

It is important to observe that in *In re Duke of Norfolk*[15] it was not in dispute that, on the true construction of the will and codicils in that case, the interest in question was one continuing annuity for the longer of the lives of the two annuitants, and could not be regarded as comprising two successive annuities: the first ceasing and the second commencing on the death of the father. It is further to be noted that the argument for the Crown was not to the effect that there was no passing of the annuity within the meaning of section 1 in respect of which duty could be claimed, and consequently that recourse must be had to section 2 (1) (*b*). Admittedly, there was a passing of the annuity under section 1, which, on the principles laid down in *Cowley's* case,[16] excluded recourse to section 2 (1) (*b*), so far as the annuity itself was concerned. It was, however, argued that it was nevertheless open to the Crown to claim in the alternative that, so far as the property charged with the annuity was concerned, the father's life interest in the annuity was an interest in that property which ceased on his death within the meaning of section 2 (1) (*b*) and, accordingly, brought about a notional passing on the father's death to the extent to which a benefit accrued or arose by the cesser of such interest, thus attracting duty on a "slice" of the capital of the property ascertained as provided in section 7 (7) (*b*). These arguments were rejected by the court as contrary to the principles laid down in *Cowley's* case [16] and also on the ground that the continuing character of the annuity made sections 2 (1) (*b*) and 7 (7) (*b*) wholly inappropriate. There was a further argument to the effect that, even if duty could only be claimed under section 1, as on an actual passing of the annuity on the death of the father, the property which passed was not simply the right to receive the annuity during the residue of the life of the son but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity. This argument was likewise rejected, and, in the result, it was held that on the death of the father there was an actual passing of the annuity under section 1 and that the annuity must be valued for duty purposes as consisting of the right to receive £2,000 per annum from the death of the father for the residue of the life of the son.

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[13] [1899] A.C. 198; 15 T.L.R. 270.

[14] [1927] 2 Ch. 275, 280.

[15] [1950] Ch. 467.

We have been invited by Sir Lynn Ungoed-Thomas, for the commissioners, to distinguish *In re Duke of Norfolk* [17] from the present case on the strength of the differences in the terms of the relevant dispositions in the two cases and also to discount its effect as an authority on the ground that it proceeded to a great extent on admissions in regard to matters vital to the question raised in the present case.

We agree that the continuing character of the annuity in *In re Duke of Norfolk* [17] was not disputed, and, having regard to the terms in which it was given, we think it plainly was a continuing annuity.

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[16] [1899] A.C. 198.

[17] [1950] Ch. 467.

We also agree that the elaborate argument for the Crown was not based on the contention that there was no passing of the annuity under section 1, but on the contention that, given such a passing, duty could nevertheless be exacted on a "slice" of capital either under section 2 (1) (*b*) or section 7 (7) (*b*) or, by analogy to the case of the cesser by death of a life interest, in an aliquot share of a fund.

Nevertheless we think it was necessary to a proper decision of the case that the court should state the principles governing the liability to duty on the death of a person entitled during his life to a continuing annuity bequeathed for the benefit of several persons in succession. Accordingly, we think we should accept as binding upon us in any comparable case the conclusions expressed by this court in *In re Duke of Norfolk.*[17]

These conclusions were to the effect that *In re Cassel,*[18] if not actually binding upon this court, was right in principle (see *per* Lord Evershed M.R.,[19] *per* Somervell L.J.[20] and *per* Jenkins L.J.[21]), and, accordingly, that where (as in *In re Duke of Norfolk*[22]) a continuing annuity is payable out of the income of a trust fund to two or more persons in succession, there is a passing within the meaning of section 1 of the Finance Act, 1894, on the death of each of the persons so entitled (other than the last to die) of property in the shape of the annuity, the value of which for estate duty purposes is the value as at the death of the person dying of the annuity for the residue of the period for which it is payable.

We do not think there is any material ground of distinction between the annuity in *In re Duke of Norfolk*[22] and the annuity in the present case.

On the true construction of clause 9 of the will in the present case, the annuity is, in our judgment, a continuing annuity. The trust, as we construe it, is to make one continuous annual payment of £3,000 out of the income of the trust fund to the three named beneficiaries or such of them as shall for the time being be living during one entire period, namely, the period until the death of the last survivor of the three named beneficiaries. We see no justification in the language used for splitting the annual payment of £3,000 into, first, three annuities of £1,000 each payable to one of the three named beneficiaries for his or her life; secondly, two fresh annuities of £500 each springing up on the death of the first beneficiary to die and the consequent cesser of such beneficiary's annuity, one of such fresh annuities of £500 being payable to each of the two surviving beneficiaries during his or her life; and, thirdly, one fresh annuity of £1,500 springing up on the death of the second beneficiary to die and the consequent cesser of such beneficiary's original and additional annuities of £1,000 and £500, such fresh annuity of £1,500 to be paid to the last surviving beneficiary during his or her life

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[17] [1950] Ch. 467.

[18] [1927] 2 Ch. 275.

[19] [1950] Ch. 467, 475, 477, 478.

[20] Ibid. 481.

[21] Ibid. 484, 485.

[22] Ibid. 467.

We cannot accept the contention, urged on behalf of the commissioners, to the effect that *In re Duke of Norfolk* [22] is distinguishable from the present case on the strength of two features of the gift in *In re Duke of Norfolk* [22] which have no counterpart here, namely: (a) the devise to the trustee of freehold hereditaments for a term of 1,000 years upon trust to pay out of the income thereof any annuity or annuities bequeathed by the testator; and (b) the gift of the £2,000 annuity to the trustee in trust for the persons successively entitled. The devise of the freehold hereditaments in question for the term of 1,000 years upon trust as aforesaid was no more than a usual conveyancing method of subjecting the income of freeholds to a trust for payment of an annuity or annuities; and the distinction sought to be drawn between a gift out of income of an annuity to a trustee in trust for persons in succession, as in *In re Duke of Norfolk*,[22] and a plain trust to pay an annuity out of the income of a fund to persons in succession, as in the present case, is to our minds for the present purpose a distinction without a difference. More significant, in our view, are the points of similarity between the two cases, namely: (a) that the effect of the gift was to subject the income of the freehold hereditaments in *In re Duke of Norfolk*,[22] and of the trust fund in the present case, to a trust for payment of an annuity to persons in succession; (b) that the annuity given took the form of one continuous annuity or annual payment of the prescribed amount of £2,000 in *In re Duke of Norfolk* [22] and of £3,000 in the present case; and (c) that the duration of the annuity was measured by the life of the survivor of the father and the son in *In re Duke of Norfolk* [22] and by the life of the last survivor of the three named beneficiaries in the present case. We would add that the intermediate gift of the annuity to the trustee in *In re Duke of Norfolk* [22] may well have been due to the circumstance noticed in the report in the All England Reports, though not in the Law Reports, that the interests of the father and the son in the annuity were made subject to certain protective trusts: see the report of the case before Wynn-Parry J.[23]

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[22] [1950] Ch. 467.

Accordingly, subject to the effect of *In re Payton*,[24] to which we should next refer, we are of opinion that this case, like *In re Duke of Norfolk*,[25] is a section 1 case, with the result that duty is payable on the property passing, that is the annuity, which must be actuarially valued as at the death of the deceased as an annuity payable during the residue of the life of Phyllis Fawell.

In re Payton[26] was concerned with two contractual pensions payable under certain group policies effected by the Austin Motor Co. Ltd. for the purpose of providing pensions for their employees. The scheme of benefits enabled an employee to take, in lieu of a pension for his own life only, a pension payable to himself during his life and thereafter to his wife if she survived him during her life. Payton, the employee concerned, exercised, with respect to each of two pensions to which he was entitled, the option of converting them so as to include his wife if she survived him. The policies securing the benefits accruing to employees constituted contracts between the insurers and the company but contained a clause under which the company declared itself to be a trustee of the benefits for the persons entitled thereto. On the death of Payton, leaving his wife him surviving, the Estate Duty Office claimed duty on the footing that his death gave rise to an actual passing of the pensions within the meaning of section 1 of the Act. His widow contended that there was no passing under section 1 but that the pensions to which she became entitled in possession on the death of Payton fell in each case within section 2 (1) (*d*) as being an annuity or other interest purchased or provided by the deceased, which was accordingly to be deemed to pass " to the extent of the beneficial " interest accruing or arising . . . on the death of the deceased." That view was greatly to the advantage of the widow, as Payton's estate was very large and a passing under section 1 would entail aggregation, whereas a notional passing under section 2 (1) (*d*) would not.

It was held by this court (affirming Wynn-Parry J.) that the case fell within section 2 (1) (*d*) and not section 1. Lord Evershed M.R. (delivering the judgment of the court) said this[27]: "Mr. Pennycuick therefore goes further and says that under "this contract there has been created a single and identifiable "(and intelligible) item of property, namely, the benefit of the "society's covenant with the company to pay what we may call "the Payton last survivor pension throughout its term; which "piece of property is enjoyed successively and is enforceable "successively by the deceased and the plaintiff. On this case "he contends that the case is in pari materia with the *Duke of* "*Norfolk's* case.[28] We have been unable to accept the argu-"ment. If the society's covenant had been with the company "to pay the latter during some period—for example, a fixed "period or the life of the longest liver of a number of named "persons—a certain annual sum; and if the company had then "declared itself a trustee of the annual sum or of the benefit of "the covenant for A and B successively, it may well be (though "we do not so decide) that the case would have been covered by "the *Duke of Norfolk's* case.[28] But the effect of the contract "seems to us to be otherwise. Adhering (as enjoined by Mr. "Pennycuick to do) to the actual terms of the bargain, there is "here no covenant with the company to pay the company any-"thing: there is a covenant with the company to pay 'the "'pension,' that is, the annual sum of £x by monthly instal-"ments, to the deceased during the period from his retirement "to his death and then to pay the same pension, that is, the "same annual sum by like instalment, to the plaintiff (if she "survives the deceased) during the rest of her life. Though the "distinction be a fine one, there does not seem to us to be in "the latter case, in any real sense of the term, any single and "continuing proprietary interest distinct from the beneficial "interests, under the contract, of the deceased and the plaintiff "respectively, which proprietary interest can be said to 'pass' "on the deceased's death."

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[23] [1949] 2 All E.R. 701.

[24] [1951] Ch. 1081.

[25] [1950] Ch. 467.

[26] [1951] Ch. 1081.

Lord Evershed M.R. later said[29]: "In the *Duke of Norfolk's* "case[30] this court held that the case before them was covered "by *In re Cassel*,[31] which it thought (having regard to later "affirmation and notwithstanding certain criticisms made of "Russell J.'s judgment) binding at least on the Court of Appeal "(see the judgment of Lord Evershed M.R.[32]); but it held

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[27] [1951] Ch. 1081, 1089.
[28] [1950] Ch. 467.
[29] [1951] Ch. 1081, 1091.
[30] [1950] Ch. 467.
[31] [1927] 2 Ch. 275.
[32] [1950] Ch. 467, 475–477.

" also that the annuity bequeathed by the first and second " codicil, being an item of property separate and distinct from " the beneficial interests therein, ' passed ' upon the death of the " first annuitant within the meaning of section 1 of the Act of " 1894. In our judgment the present case is essentially different " from the *Duke of Norfolk's* case [33] and also from *In re Cassel.*[34] " In each of the latter cases the annuity arose out of specified " trust property—the provisions of the will directed the trustees " to raise the amount of the annuity yearly out of the income of " the trust funds, for securing which in the *Duke of Norfolk's* " case [35] a term of years was also created. The annuity so raised " was given to the trustees to hold (in the *Duke of Norfolk's* " case [35]), or was to be applied by the trustees (*In re Cassel* [36]) on " trust for certain persons successively. In the present case the " only rights and interests subsisting or capable of subsisting " arise exclusively out of the terms of the contract of insurance. " The only right of property which, according to the suggestion " of the Crown, emerges from the respective policies is a chose " in action. But a mere chose in action cannot, in our judgment, " be considered or comprehended apart and separately from the " right to enjoy, by the terms of the contract, the benefit contracted to be given. If there be any rights or interests in the " company, as distinct from the separate and individual rights " of the pensioners, they seem accordingly to us altogether too " spectral to be fairly analogous to the interests of the trustees " in the *Norfolk* [37] or *Cassel* cases [38] or to be fairly regarded as " ' passing ' on the death of Mr. Payton within the meaning of " section 1 of the Finance Act, 1894."

These passages make it perfectly plain that *In re Payton* [39] was regarded by the court as a wholly different case from *In re Duke of Norfolk*,[40] the pensions in the former case being purely contractual and not payable out of the rents of a landed estate (as in *In re Duke of Norfolk* [40]) or out of the income of a trust as in the present case. The interests arising out of the policies of insurance in *In re Payton* [41] could aptly be described as the Master of the Rolls described them, as " mere choses in action "; but we must say we deprecate the application of that description to an annuity payable out of the income of a fund under a trust.

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[33] [1950] Ch. 467.
[34] [1927] 2 Ch. 275.
[35] [1950] Ch. 467.
[36] [1927] 2 Ch. 275.
[37] [1950] Ch. 467.
[38] [1927] 2 Ch. 275.
[39] [1951] Ch. 1081.
[40] [1950] Ch. 467.
[41] [1951] Ch. 1081.

So far from casting doubt on *In re Duke of Norfolk*[42] it appears to us that *In re Payton*[43] reinforces its authority.

In *In re Weigall's Will Trusts*[44] Harman J. followed *In re Payton*[45] on the ground that, upon the true construction of the gift with which he was concerned, "the two annuities did not "constitute one piece of property which came into existence on "the death of the testator and which passed from the brother to "the widow on his death, but that on his death a new beneficial "interest arose which was now vested in the widow. . . ." In other words, in the view taken by the judge of the construction of the gift before him, the case was not one of a continuing annuity. We find ourselves unable to accept that construction of the gift in question, and are accordingly of opinion that *In re Weigall's Will Trusts*[46] was wrongly decided.

Be that as it may, in the present case, in our judgment, there was a single continuing annuity. On the death of the deceased his life interest in one-half of the annuity no doubt came to an end. But the annuity did not cease. It continued to be payable, with the difference that the half-share thereof which had theretofore been payable to the deceased during his life became payable to Phyllis Fawell as the last survivor of the three named beneficiaries. Accepting, as we must, the principles laid down in *Cowley's* case[47] with regard to the respective functions of sections 1 and 2 of the Act, that seems to us to be a reasonably plain case of "passing" within the meaning of section 1, and we think it would be impossible to hold otherwise consistently with *In re Duke of Norfolk*[48] and *In re Cassel.*[49] Still less is it possible to hold, consistently with these cases, that a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession or (by parity of reasoning) to several persons and the survivors or survivor of them does not constitute property capable of passing on the death of each successive taker other than the last.

For these reasons we are of opinion that this appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Charles Russell & Co.*

B. A. B.

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[42] [1950] Ch. 467.
[43] [1951] Ch. 1081.
[44] [1956] Ch. 424.
[45] [1951] Ch. 1081.
[46] [1956] Ch. 424.
[47] [1899] A.C. 198.
[48] [1950] Ch. 467.
[49] [1927] 2 Ch. 275.

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July 16, 17,
22.

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C. A.

1959
Jan. 16,
19, 20;
Mar. 9.

Jenkins,
Romer and
Pearce L.JJ.

THOMSON (INSPECTOR OF TAXES) *v.* MOYSE.

Revenue—Income tax—Foreign income—Remittance to United Kingdom—Cheques drawn in dollars on foreign bank—Purchase by English bankers—Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England—Whether income from foreign securities or possessions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D,* 1 (*a*) (i), *Cases IV, r.* 2, *and V, r.* 2.

A taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, was entitled to income from the estates of his mother and his father, both estates being situate in the United States. Payments of income from the estates were made by the trustees into an account in the taxpayer's name in the Bank of New York.

The taxpayer carried out the following transactions: (a) he drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in the United Kingdom and requested them to purchase the cheques; (b) his English bankers, as authorised dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques; (c) his bankers then, by registered mail, presented his cheques to the Bank of New York, which honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States.

The taxpayer was assessed to income tax under Cases IV, rule 2, and V, rule 2, of Schedule D to the Income Tax Act, 1918,[1] in respect of these transactions.

Wynn-Parry J. held, (1) that the taxpayer's receipts were derived from contracts for the purchase of sterling made in England

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[1] Income Tax Act, 1918, Sch. D: "1. Tax under this Schedule shall "be charged in respect of—(*a*) the "annual profits or gains arising or "accruing—(i) to any person residing "in the United Kingdom from any "kind of property whatever, whether "situate in the United Kingdom or "elsewhere. . . ."

"Case IV.—Tax in respect of in"come arising from securities out of "the United Kingdom. . . . Case V. "—Tax in respect of income arising "from possessions out of the United "Kingdom. . . ."

"*Rules applicable to Case IV*: 1. "The tax in respect of income arising "from securities in any place out of "the United Kingdom shall be com"puted on the full amount thereof "arising in the year of assessment, "whether the income has been or will "be received in the United Kingdom "or not. . . ."

"2. The foregoing rule shall not "apply—(*a*) to any person who satis"fies the Commissioners of Inland "Revenue that he is not domiciled in "the United Kingdom, or that, being "a British subject, he is not ordi"narily resident in the United "Kingdom. . . ."

"The tax in any such case shall "be computed on the full amount, so "far as the same can be computed, "of the sums which have been, or

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to be performed in England, and the English bankers in purchasing the dollars acted as principals and not as agents, and that the income did not therefore fall within Case IV, rule 2, and (2) that there was no evidence that dollars were ever brought into this country, or, if they were so brought in, it was not as the property of the taxpayer but of the Bank of England, and, accordingly, the income did not fall within Case V, rule 2.

On appeal:—

Held (Pearce L.J. dissenting), (1) that the income was not taxable under either rule 2 of Case IV or rule 2 of Case V.

(2) That although for tax purposes sums might be remitted from abroad without the physical transfer of currency, there was no such conception as constructive receipt under the material provisions, and in deciding whether there had been a remittance of money payable in the United Kingdom only the actual form of the transaction was relevant, not its substance.

Hall v. *Marians* (*No. 2*) (1935) 19 T.C. 582 applied.

Scottish Mortgage Company of New Mexico v. *McKelvie* (1886) 2 T.C. 165; *Gresham Life Assurance Society Ltd.* v. *Bishop* [1902] A.C. 287; 4 T.C. 464; *Forbes* v. *Scottish Provident Institution* (1895) 3 T.C. 443; *Kneen* v. *Martin* [1935] 1 K.B. 499; 19 T.C. 33 considered.

(3) That in the present case the income had not been brought to the United Kingdom from abroad and there "received" by or to the order of the taxpayer within the meaning of the relevant rules. In each transaction the only sum received by the taxpayer was the purchase price in sterling of the cheque sold to the English bank. That payment was made in London pursuant to a contract also made there and neither the sterling nor the cheque was a remittance from New York payable in the United Kingdom. Thereafter the English bank acted as a principal and even if ultimately the money received by the English bank was brought into the United Kingdom (as to which there was no evidence) the

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"will be, received in the United "Kingdom in the year of assessment "without any deduction or abate-"ment."

"*Rules applicable to Case V*: . . . "2. The tax in respect of income "arising from possessions out of the "United Kingdom, other than income "to which rule 1 applies, shall be "computed on the full amount of the "actual sums annually received in "the United Kingdom from remit-"tances payable in the United King-"dom, or from property imported, or "from money or value arising from "property not imported, or from "money or value so received on credit "or on account in respect of any such "remittances, property, money, or "value brought or to be brought into "the United Kingdom, on an average "of the three preceding years as "directed in Case I, without any "deduction or abatement other than "is therein allowed."

"3. Rule 1 of the foregoing rules "shall not apply—(*a*) to a person "who satisfies the Commissioners of "Inland Revenue that he is not domi-"ciled in the United Kingdom, or "that, being a British subject, he is "not ordinarily resident in the United "Kingdom . . . and in such cases the "computation shall be made in "accordance with rule 2."

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taxpayer had no interest in it, and it could not, therefore, be his income for tax purposes.

Timpson's Executors v. *Yerbury* [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155; *Carter* v. *Sharon* (1936) 20 T.C. 229; [1936] 1 All E.R. 720; *Scottish Provident Institution* v. *Farmer* (1911–12) 6 T.C. 34 distinguished.

(4) That the sterling payment was not "money or value arising "from property not imported" within the meaning of rule 2 of Case V. The sterling payment arose in the United Kingdom.

Dicta in *Foulsham* v. *Pickles* [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261 and *Inland Revenue Commissioners* v. *Gordon* (1952) 33 T.C. 226; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866 applied.

Per Pearce L.J. The proceeds of the sale of the cheques remained income notwithstanding the change of form. "Received" for the purposes of Cases IV and V covers transmission in any form known to the commercial world. In the present case a well-established method was used and it was a reasonable business inference that after the sale had taken place foreign income arrived in the United Kingdom. The taxpayer, accordingly, received the income in the United Kingdom when he sold the cheques, and it was immaterial both that the receipt by him was in advance of the actual remittances and that at the time when the transit took place the remittances were not the property of the taxpayer.

Decision of Wynn-Parry J. affirmed.

CASE STATED by the Commissioners for Special Purposes of the Income Tax Acts.

The case stated, so far as material, provided:

1. At meetings of the commissioners held on January 23 and 24 and February 1, 1957, Stephen Dickson Moyse (the respondent) appealed against the following assessments to income tax made upon him under Cases IV and V of Schedule D of the Income Tax Act, 1918: (a) Under Case IV for the year 1949–50 in the sum of £2,335 and for the years 1950–51 and 1951–52 in the sum of £2,500 for each year. (b) Under Case V for the year 1949–50 in the sum of £3,457 and for the years 1950–51 and 1951–52 in the sum of £3,500 each year.

The question for determination was whether the respondent was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

. . . . .

3. The following facts were admitted or proved:

(a) The respondent was born an American citizen and was and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom.

(b) At all material times the respondent was entitled to a life interest in a trust in the United States of America under the will of his father the late Leon Moyse. He was also entitled to a life interest in the residuary estate of his mother, the late Mrs. A. D. Schmucker (widow of the said Leon Moyse) also in the United States of America. This estate was in course of administration from August 19, 1943, until April 18, 1951. The income from those two life interests was paid in dollars by the executors and trustees into the respondent's account at the Wall Street, New York, branch of the Bank of New York.

It was common ground that this income, in so far as it arose in the course of the administration of the Schmucker estate, was income arising from securities out of the United Kingdom [section 30, Finance Act, 1938] and that, in so far as it arose from that estate after the completion of the administration and from the Leon Moyse trust, it was income arising from possessions out of the United Kingdom.

(c) Under section 1 (1) of the Exchange Control Act, 1947, the respondent was prohibited from selling, without Treasury permission, the said dollars to any person other than an authorised dealer as defined by section 42 of the Act. By section 2 (1) of the Act, in default of Treasury permission to retain them, he was compelled to offer the said dollars for sale to such a dealer. At no time during the material period did the respondent have permission to sell (otherwise than to an authorised dealer) or to retain the said dollar income the subject of these appeals. Both Seligman Brothers, Merchant Bankers of Austin Friars in the City of London, and the Midland Bank Ltd., were authorised dealers.

(d) Between 1924 and 1926 the respondent trained as a volunteer with Seligman Bros. From his experience in banking the respondent was aware that a practice existed whereby a banker, provided he knew the particular customer, might be willing to purchase outright cheques in foreign currencies drawn on foreign banks. This practice of buying and selling cheques drawn in foreign currencies was a very old established one in the City of London and was part of the normal banking business of Seligman Bros. A banker might be willing to act as a principal in this manner even though he had no knowledge of the state of the customer's account at the foreign bank, provided that he was satisfied as to the customer's integrity. Otherwise he would follow the normal method, used, for example, in the case of cheques drawn in this country on banks in the United

Kingdom, and collect the money from the drawer's foreign bank as an agent and credit the customer's account in due course.

(e) Nothing, except as shown in sub-paragraph (i) below, was paid into the respondent's New York bank account other than his income from the aforesaid life interests. For the period relevant to the assessments in question the respondent drew certain cheques in dollars on his New York bank account in favour of either Seligman Bros. or Midland Bank Ltd. (of London).

(f) With each of the four cheques drawn in favour of Seligman Bros. in June, August and December, 1948, and February, 1949, the respondent sent Seligman Bros. a letter asking them to purchase the cheque and to credit his account with the proceeds in sterling and subsequently to transfer part of the proceeds to the credit of his bank account with Midland Bank Ltd., Kingsway. The letter sent to Seligman Bros. on August 24, 1948 (for example), stated as follows: "I enclose "herewith my cheque on New York in the amount of $6,144.04. "Would you kindly purchase this and credit my sterling account "correspondingly, under the usual advice. Upon completion "of the above, kindly arrange to credit my account with the "Midland Bank Ltd., Kingsway Branch, with the amount of "£1,750 0s. 0d., debiting my account with your goodselves "correspondingly. . . ." The cheque dated February 16, 1949, was enclosed with the following letter to Seligman Bros.: "I "enclose herewith my cheque on New York in the amount of "$7,266.29. Would you kindly purchase this and credit my "sterling account correspondingly, u.u.a. On completion of the "transaction would you kindly arrange to credit my account at "the Midland Bank Ltd., Kingsway Branch, with £1,600 "(Sixteen hundred pounds) u.u.a."

(g) Seligman Bros. purchased the aforementioned four cheques. On receipt of each cheque Seligman Bros. wrote to the respondent using the following form of letter: "We con-"firm having sold for your account today:

"$7,266.29 at 4.03½ producing	£1,800 16s. 4d.
"for which amount, less ⅛% Exchange Commission & stamp and other charges	2 5s. 2d.
i.e.	£1,798 11s. 2d.

"We credit your account val. 18th inst. u.u.r. We have "received the above foreign currency by cheque on New York." The phrase "sold for your account" was used by Seligman Bros. in these letters because during this period Seligman Bros. believed that owing to the exchange control which was introduced under the defence regulations they were not permitted to deal in foreign currency on their own account, but that they were required to act as agents of the Bank of England and to sell either to the Bank of England or to persons holding a permit from the Bank of England. Consequently, the pre-war form of confirmation used by Seligman Bros. "We confirm that we "have bought from you a cheque for . . ." was altered to "We "confirm we have sold for your account." The dollars so purchased were either sold to the Bank of England or to a customer with a permit to purchase dollars from the Bank of England or to a person with whom Seligman Bros. were entitled to deal within the limits set by the Bank of England. The words "We credit your account val. 18th inst." were employed by Seligman Bros. in the above letter in accordance with their usual practice whenever they purchased cheques in foreign currency. The foreign currency was valued in sterling on the day following, which in fact would be the actual day upon which the currency would normally be sold by Seligman Bros. on the market or to the Bank of England. The letters "U.U.R.," meaning "under "usual reserve," were always put in any statement by Seligman Bros. whenever they bought or negotiated cheques or bills of exchange. "U.U.R." in no way altered the customer's legal obligation under the contract under the Bills of Exchange Act, 1882, but drew his attention, in case he was not conversant with the legal position, to the fact that recourse could be had to him should any defect be found in the cheque when it ultimately was presented for payment. Seligman Bros. viewed the transactions with the respondent as purchases and sales of currency. They considered that the contracts were for dollars implemented by the respondent handing them a cheque in that currency.

(h) Seligman Bros. employed correspondents in New York to whom they sent all New York cheques acquired by them by registered mail every day. The New York correspondents were instructed by Seligman Bros. to carry out the following transactions in relation to each one of the respondent's cheques: (a) to have the cheque cleared on the respondent's bank in New York; (b) to credit the dollars to Seligman Bros.' bank account in New

York; and (c) to pay out of Seligman Bros.' New York bank account so many dollars (as had been sold to the Bank of England) to the Federal Reserve Bank in New York for the credit of the account of the Bank of England. The procedure of the Midland Bank Ltd. was similar to that of Seligman Bros.

(i) A cheque drawn in favour of the respondent by the United States Treasury representing a refund of United States Federal Tax in the sum of $908.19 was received by the respondent through the post from the United States Treasury and forwarded by him to Seligman Bros. on December 8, 1948, with instructions "to convert this into sterling." This particular item was quite distinct from all the other transactions with which this appeal was concerned as the cheque was not drawn on the respondent's bank account in New York. Nevertheless Seligman Bros. adopted the same practice and purchased this cheque crediting the respondent with the sterling equivalent.

(j) On June 16, 1949, the respondent drew a cheque on his New York bank account in favour of the Midland Bank Ltd., in the same manner as previously he drew cheques in favour of Seligman Bros. From and after this date the respondent used the Midland Bank Ltd., for 12 of these transactions during the relevant period from June 16, 1949, to January 29, 1952. No copies of the respondent's letters which accompanied these cheques to the Midland Bank were available except a letter dated January 29, 1952, from the respondent to the Midland Bank as follows: "I am enclosing herewith my cheque on New York in "the amount of $5,700 and shall be glad if you will credit my "account with the sterling equivalent."

On January 30, 1952, the Midland Bank wrote to the respondent as follows: "We are in receipt of your letter of the 29th "inst. enclosing your cheque on New York for $5,700, and your "account has today been credited with the proceeds, amounting "to £2,045 9s. 10d. This is made up as follows:

"$5,700 at 22.785/16ths	£2,048 1s. 1d.
"*Less* Commission	2 11s. 3d.
	£2,045 9s. 10d."

(k) Neither Seligman Bros. nor Midland Bank Ltd. was aware of the source of the respondent's funds lying in his New York bank account nor did either of the two English banks make any inquiry as to the extent of his resources in the United States. The respondent had been acquainted with the general manager of Seligman Bros. for some 30 years. Seligman Bros. would not purchase a cheque drawn on a foreign bank if the person desiring to sell the cheque was not well known to them as a person of integrity.

(l) Seligman Bros. never made returns to the Exchange Control Committee of the Bank of England showing individual items relating to the respondent. The cheques purchased from the respondent were included with other cheques in the periodical returns which Seligman Bros. as an "authorised bank" were required to make to the Bank of England. Such returns were in a global sum and did not show individual items. A similar practice was followed by the Midland Bank Ltd.

(m) Midland Bank Ltd. bought cheques drawn on New York and in such cases would credit the account of the customer the same day, whereas in cases where they were clearing a cheque (which did not arise in the case of the respondent) it would be a matter of some days before the customer got the credit.

4. It was contended on behalf of the respondent:

(a) that the sums received by the respondent in the United Kingdom arose from contracts concluded in the United Kingdom between the respondent and the respective bank, and that these sums were not remittances of United States income;

(b) that the respondent's United States income was not property received by him in the United Kingdom within the meaning of Case IV and rule 2 of Case V;

(c) that the source of the sterling credited to the respondent's London bank accounts was the sale and purchase as between the respondent and the particular one of the two United Kingdom banks in each transaction.

5. It was contended on behalf of the Crown:

(a) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the estate of the respondent's mother during the period of administration were sums received in the United Kingdom, within the meaning of Case IV, rule 2, of Schedule D;

(b) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the income from the estate of the respondent's mother after the period of administration or to the income from the estate of the respondent's father were sums received in the United Kingdom within the meaning of Case V, rule 2, of Schedule D.

7. The commissioners gave their decision in the following terms: "The question we had to answer was whether on the "facts of the present case—and we had heard evidence not only "from the respondent but also from eminent bankers—the "respondent was liable to tax under Case IV and Case V of "Schedule D in respect of income from foreign securities and "foreign possessions. The respondent had a bank account in "New York and into that bank account there was credited the "whole of his American income. The respondent gave no "instructions to his New York bank to remit sums of money to "him in the United Kingdom. From time to time the respondent drew cheques in dollars on his New York bank account "in favour of Seligman Bros. or Midland Bank Ltd., which he "asked those banks to purchase from him. At the time of each "such request the respondent instructed the purchasing bank to "place the proceeds in sterling to the credit of his United "Kingdom account. The respondent's requests and instructions "were in every case duly complied with. It seems clear to us "that neither Seligman Bros. nor the Midland Bank Ltd. were "acting as a collecting agent on the respondent's behalf but in "every case acted as a principal, and we so found.

"Evidence had also been given of the transactions which took "place between the purchasing banks and the Bank of England "and the correspondents in the United States. Having regard to "that evidence (which we accepted) and the arguments that had "been addressed to us, we held that no remittances of American "income had been brought into the United Kingdom. Furthermore, on the reasoning employed by Lord Cohen in . . . *Inland* "*Revenue Commissioners* v. *Gordon*,[2] we did not accept the view "that there had been a constructive remittance. Our decision "applied equally to the Case IV assessments as to the Case V "assessments. Accordingly, we held that the appeal succeeded in "principle and we left figures to be agreed between the parties."

On appeal by the Crown from that decision the question was whether on the facts as found by the commissioners there was evidence on which they could properly arrive at their decision, and whether on the facts so found their determination was correct in law.

John Foster Q.C. and *Alan S. Orr* for the Crown.

F. N. Bucher Q.C. and *P. J. Brennan* for the respondent taxpayer.

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[2] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.

WYNN-PARRY J., having stated the facts, continued: On the facts the question arises: Do those transactions fall within Case IV or Case V of Schedule D to the Income Tax Act, 1918? It is to be remembered that the charge is levied under Schedule D, paragraph (1) (*a*) (i), and that Case IV and Case V of that Schedule are relieving provisions. It follows, in my view, that they should not be used to extend the liability of the taxpayer.

Mr. Bucher contends that the transactions between the respondent and his English bankers is reducible to this: (1) I give you a cheque drawn on the Bank of New York in dollars; (2) you give me the sterling equivalent at the prevailing rate of exchange; (3) my cheque on the Bank of New York is the consideration for your payment to me of that sterling sum; (4) if the Bank of New York meet my cheque the transaction is finished; but if they do not do so for lack of sufficient funds, then you can come upon me for the amount of sterling which you have paid to me. In other words, it can be said that this is a contract for the purchase of sterling made in England and to be performed in England, and it is no part of the contract that dollars are to be brought into England. Further, there is no evidence that dollars were brought into England, but, if they were brought in, they were so brought in not as the property of the respondent but as the property of the Bank of England. In my view, this reasoning is correct.

It is further said: income tax is a tax on sterling; suppose that between the date of the giving of the cheque drawn on the Bank of New York by the respondent to his English bankers there had been a fluctuation in the rate of exchange, then it must follow that when the cheque drawn by the respondent was presented by the English bankers to the Bank of New York it would not produce a sum in sterling equivalent to the sum which had been paid by the English bankers on taking over (to use a neutral term) the respondent's cheque drawn on the Bank of New York. This, it is said (and I think rightly so), emphasises and supports the view of the special commissioners that, however the transaction is regarded, the English bankers acted as principals and not as agents.

Mr. Foster strongly contested this conclusion of the special commissioners, but, having carefully considered their findings in paragraph 7 of the case, which I regard as findings of primary facts, and applying the test applied by Lord Radcliffe in *Edwards* v. *Bairstow*,[1] I am not prepared to say that the conclusion of fact at which they arrived was contrary to the only reasonable possible conclusion. Apart from the statement of primary facts in paragraph 7 of the case, I observe that the special commissioners had the benefit of considering a large number of documents which do not form part of the case, though they were available for examination, and of hearing witnesses examined and cross-examined. In those circumstances, it appears to me that I should hesitate long before I interfere with their conclusion that the English bankers acted as principals, particularly as it appears to me to be the proper conclusion on my analysis of the facts.

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[1] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

Upon that view of the facts it appears to me that the result must be the same, whether the case is considered under Case IV or Case V. I do not, for myself, feel, upon that issue, that it is necessary to embark upon any detailed review of the authorities.

So far as Case IV is concerned, I think I need do no more than refer to *Paget* v. *Inland Revenue Commissioners*.[2] So far as material the headnote reads as follows[3]: " Miss Paget held " certain Hungarian bearer bonds the interest coupons of which " were payable in London in sterling and in certain other countries " in the respective currencies of those countries. By a decree " dated December 22, 1931, the Hungarian Government directed " that the interest on the bonds should not be paid direct to " creditors but that its equivalent in pengos should be deposited " with the Hungarian National Bank and placed in a foreign " creditors' fund, out of which bondholders might obtain payment " of interest coupons in pengos, but only for use for certain " purposes in Hungary. Miss Paget did not obtain payment in " this way, but sold certain coupons, after they had fallen due, " through agents or coupon dealers in London, who deducted " income tax on payment to her of the proceeds of such sales. " Miss Paget also held certain bearer bonds of the Kingdom of " Yugoslavia, the coupons of which were payable in American " dollars in New York. On July 24, 1933, the Yugoslavian " Government gave notice of its inability to pay the interest in " full and offered to meet the coupons maturing from November 1, " 1932, to May 1, 1935, either by payment in ' blocked ' dinars " in Belgrade or by payment of 10 per cent. of their face value in " dollars and by the issue of funding bonds for the balance. Miss " Paget did not accept this scheme but in September, 1933, sold " the interest coupons due on November 1, 1932; and May 1, " 1933, through agents or coupon dealers in London, who

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[2] [1938] 2 K.B. 25; 21 T.C. 677.

[3] 21 T.C. 677.

"deducted income tax on payment to her of the proceeds of such "sale. On an appeal against assessments to surtax for the year "1932 to 1933 and 1933 to 1934 the special commissioners decided "(a) that the deposit of pengos with the Hungarian National "Bank constituted performance of the obligation to pay interest "on the Hungarian bonds and the proceeds of the coupons falling "due at the respective dates of deposit represented interest "arising to Miss Paget and must be included in her total income "for surtax purposes." Then they held differently as regards the Yugoslavian bonds. On appeal to the court it was held "that "in neither case did the proceeds of sale of coupons received by "Miss Paget constitute income for income tax purposes."

In the course of his judgment in the Court of Appeal Greene M.R., having considered the argument that the case fell within Schedule C and having rejected it, said [4]: "The appellants' main "argument, therefore, fails. But they claimed in the alternative "that the purchase price of the coupons was 'income arising from "'securities out of the United Kingdom,' and was charged with "income tax under Case IV of Schedule D. There are two sub-"divisions of this argument. The first is that the purchase price "was taxable by deduction under Miscellaneous Rule 7, which "applies to certain interest, etc., the Rules of Schedule C already "discussed. The second is that Miss Paget was directly assess-"able in respect of the purchase price. The latter of these two "contentions can be disposed of quite shortly. The purchase "price received by Miss Paget was not income arising from the "bonds at all. It arose from contracts of sale and purchase "whereby Miss Paget sold whatever right she had to receive such "income in the future, as well as her right to take what was "offered by the defaulting debtors. It is, in my opinion, quite "impossible to treat this as equivalent in any sense to 'income "'arising from' the bonds."

Romer L.J. also rejected the argument that the case fell within Schedule C, and he said [5]: "In these circumstances, the "only question to be decided is whether the proceeds of sale of a "right to receive income in the future can be treated as income "for the purpose of the Income Tax Acts. The question thus "broadly stated plainly admits of but one answer; and that "answer must be in the negative. The proceeds of the sale for a "lump sum of an annuity, for instance, are capital in the hands "of the vendor and not income. And this is true even when the

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[4] [1938] 2 K.B. 25, 35.

[5] Ibid. 44, 45.

"subject of the sale is not the annuity for the whole duration but "the right to be paid the annuity for a number of years or even "for one year. Nor is it any the less true because the purchaser "will pay less for an annuity that will be subject to deduction "of income tax in his hands than he would pay for a tax-free "annuity. Nor is it any the less true because in many cases "the net income when paid to the purchaser is not income in "his hands. In the case, for instance, of a man carrying on the "business of dealing in coupons, the sum collected by him on "cashing a coupon will be merely a trade receipt and not income. "Tax may have been deducted on payment of the coupon, but "for sur-tax purposes the interest represented by the coupon "cannot be regarded as forming part of the total income of "anybody. This is a position that frequently occurs. The net "income received by a trustee under a trust for accumulation "of income is a case in point. But it is easy to conceive cases "which, while appearing at first sight to be sales for money or "money's worth of a right to receive income in the future, are "not in reality sales at all. If a man possessed of a coupon "representing interest payable under deduction of tax hands it "to his tailor as a convenient method of paying for a suit of "clothes, the tailor, when cashing the coupon may well be "considered as doing so on behalf of his customer, and then "paying himself out of the proceeds. The customer in such a "case could not avoid returning the gross amount of the interest "as part of his total income for sur-tax purposes. If, on the "other hand, the tailor were to accept the coupon in full dis-"charge of his account the interest that it represents would not, "when paid, be income of the customer. Still less would the "suit of clothes form part of his income."

On the reasoning of those passages, and having regard to the view which I have taken of the transactions in this case, I conclude that none of the transactions in question falls under Case IV.

So far as Case V is concerned, the transactions in the present case appear to me to fall within the decision in *Carter* v. *Sharon.*[6] In the case of income from foreign possessions it must be shown either that the taxpayer received it in this country or that he was entitled to it at the time it arrived in this country.

There is a passage in the speech of Lord Cave in *Foulsham* v. *Pickles*[7] to which I would desire to refer. Having stated rule 2 of Case V, Lord Cave said[8]: " From this rule it follows that, " in order to be taxable under Case V, an income arising from " possessions out of the United Kingdom must be received in the " United Kingdom either (a) from remittances payable in the " United Kingdom, or (b) from property imported into the United " Kingdom, or (c) from money or value arising from property not " imported, or (d) from money or value received on credit or on " account of remittances, property, money, or value brought or " to be brought into the United Kingdom. The word ' remit-" ' tances ' (which recalls the expression ' remittances from " ' thence ' in the corresponding rule contained in the Act of " 1842) clearly refers to money remitted into the United King-" dom from outside. The other branches of the rule all refer to " property, money or value imported or brought into the United " Kingdom, and there are no words in the rule which can " comprise money arising and payable here. If so, the inference " is that money so arising and payable is outside the rule, and " so is not taxable under Case V at all."

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[6] [1936] 1 All E.R. 720; 20 T.C. 229.

[7] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261.

I cite that passage in support of the proposition, which I do not see can be denied, that, in order for Case V to operate, the dollars in question in this case must be shown to have been brought into the United Kingdom. I have, however, held that it is not shown that any dollars were brought into the United Kingdom as a result of the transactions in question.

The only observation I would add is upon a passage from the speech of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[9] where he said, in considering an argument put forward by Mr. Tucker which he abandoned in the course of the case[10]: " There might have been another difficulty in Mr. Tucker's way " had he persisted in this argument. To succeed on it, it would " have been necessary for him to satisfy us that the ' money or " ' value arising from property not imported ' need not itself be " brought into the United Kingdom. It is plain from the wording " of the rule that sums cannot be said to be received in the " United Kingdom from the first, second or fourth sources unless " the source was itself payable in, imported into, or brought or " to be brought into the United Kingdom. It would be strange " if the sums received in the United Kingdom from the third " source were within the rule although the money or value was " not imported or to be imported into the United Kingdom. It

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[8] [1925] A.C. 458, 464.

[9] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.

[10] [1952] 1 T.L.R. 917.

"would be all the more strange since sums received in the "United Kingdom from the fourth source, i.e., 'money or value "'so received on credit or on account or in respect of . . . such "'money or value' (i.e., the third source)—could not bring the "rule into operation unless such money or value had been brought "or was to be brought into the United Kingdom. I incline, "therefore, to the view that to succeed under the rule in respect "of sums received from the third source the Crown must establish that the money or value had been brought or was to be "brought into the United Kingdom."

It is true that the point there dealt with by Lord Cohen and the opinion which he said he inclined to express was expressly reserved by Lords Morton and Tucker, though Lord Normand adopted the whole of Lord Cohen's speech. I propose for the purposes of this judgment to assume that what Lord Cohen said is strictly speaking to be regarded as obiter, but, accepting that basis, I would respectfully adopt the language of Lord Cohen as my own for the purposes of this judgment, because the analysis which he there makes appeals to my mind.

Mr. Foster relied strongly on *Scottish Mortgage Company of New Mexico* v. *McKelvie*.[11] That case has been the subject of both comment and criticism. Where it has been considered to have been rightly decided, it has been regarded as a case turning on its very special facts. Certainly it has been said that it is not to be regarded as a starting point from which to draw new inferences. Even more so, I cannot regard it as a satisfactory authority for the purpose of cutting down the relieving effect of Case IV or Case V.

During the argument a great many authorities were referred to and carefully and exhaustively examined by Mr. Foster. I am grateful to him, and indeed also to Mr. Bucher, for the care which was bestowed upon the authorities, and I intend no disrespect to either of them, particularly to Mr. Foster, for not having traversed them seriatim. As I hope will be seen from my judgment, my decision really first and last turns on the analysis of the transactions which I have made; and upon that analysis and having regard to what I conceive to be the effect of Cases IV and V, then, under whichever case the matter can be said to fall, no dollars representing the income of the respondent were, over the material period, brought into the United Kingdom.

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[11] (1886) 2 T.C. 165.

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For these reasons, in my view the appeal must be dismissed with costs.

Appeal dismissed.

I. G. R. M.

The Crown appealed.

John Foster Q.C. and *Alan S. Orr* for the Crown. The Crown contends, first, that the receipt by the bank of the dollar cheques drawn by the respondent was a receipt in the United Kingdom by the respondent of his American income, and, secondly, that the crediting of the sterling equivalent of the dollar cheques to the respondent's account in the United Kingdom was the receipt in the United Kingdom of the respondent's American income.

Wynn-Parry J. held that no dollars were ever brought into the United Kingdom and, therefore, that there was no receipt of income in the United Kingdom. In rule 2 of Case IV "sums "received in the United Kingdom" means, except in unusual circumstances, something less than the physical receipt of currency. In deciding whether income was "received," it is necessary to see if there was a receipt. There would never be evidence that dollars came into the country, but a cheque paid to a bank would be a receipt of dollars. The position would be different if the respondent had sold his income in the United States and had invested the proceeds there. The respondent in fact drew his own cheque. That amounted to a remittance of the amount of the cheque to the United Kingdom before its sale.

There was here a remission of the income. In *Timpson's Executors* v. *Yerbury*[1] a trust company on the direction of a beneficiary entitled to income had remitted bills of exchange drawn on London and payable out of her income to her children in the United Kingdom, and it was held that the amounts remitted were her income to the date of encashment here and she was taxable on such amounts. The present case is simpler than that. Here the respondent drew the cheques which were paid to his account. In *Carter* v. *Sharon*[2] the income became the donee's before it left America. *Scottish Mortgage Company of New Mexico* v. *McKelvie*[3] is an extreme case where it was held that the sale of sterling on its payment to third persons abroad would be a receipt of income here. *Gresham Life Assurance Society*

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[1] [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155.

[2] [1936] 1 All E.R. 720; 20 T.C. 229.

[3] (1886) 2 T.C. 165.

Ltd. v. *Bishop*[4] is on the other side of the line. There it was held that interest received abroad and included in a company's statement of accounts had not, on the facts, been received in the United Kingdom within Case IV. If the respondent's contention in the present case is sound, *Scottish Provident Institution* v. *Farmer*[5] would not have been decided in favour of the Crown. In *Hall* v. *Marians (No. 2)*[6] and in *Forbes* v. *Scottish Provident Institution*[7] it was held that there was no receipt of income here. In *Kneen* v. *Martin*[8] the sums remitted did not represent income.

This case is distinguishable from *Paget* v. *Inland Revenue Commissioners*,[9] for Miss Paget had only a right to receive income. Unlike the bonds in *Scottish Provident Institution* v. *Farmer*,[10] which were not income until they were cashed, the income which the cheques represented was received in the United Kingdom when the cheques were sold to the banks in return for sterling. The taxpayer submits that nothing has happened in the United Kingdom, because the dollars have not moved from America, but, if the cheques were not met, the clearing would have to be corrected. "Receipt" is a commercial term with a well-established meaning of having got, or been paid, income. "Receipt" of a cheque is receipt of that amount of income. In *Paget's* case[11] the income could not be brought to the United Kingdom. In a physical sense the dollars in this case could not be brought here, but it is submitted that, even if the taxpayer had gone to America and brought the actual dollars here, it could not be said that he had not "received" them here. It has never been suggested that there is any relevant difference between Cases IV and V—a cheque satisfies both cases—but it is submitted that Case V applies even if Case IV does not. It was said in *Timpson's Executors* v. *Yerbury*[12] that if a cheque was received by the bank, and the bank at the taxpayer's direction gave value for it to a third party, there would be no doubt that the taxpayer would be entitled to the income in the United Kingdom and should in fairness be charged whether he actually received it or not. See also *Paget's* case.[13] The taxpayer in the present case received the income by substituting the English debtor in sterling for the American debtor in dollars. If the rate of exchange had altered before the date of actual clearance of the cheque, he would still have received the income in London. In *Paget's* case [14] it was incorrect to say that when the coupons were sold the amount had already been placed to Miss Paget's credit in the foreign bank. It had been paid into a central fund and the pengos were only released subject to conditions. Miss Paget had a right to receive income, but as she sold the coupons she never did receive the income. If she had complied with the conditions imposed by the Hungarian Government and had cashed the coupons and had then contrived to bring the pengos to the United Kingdom, she would have been liable to tax. The loophole which that case revealed was covered by section 24 of the Finance Act, 1938 [15]—the meaning of which was made clear by the necessity for further legislation during the war to exclude liability to tax on payments made by the Treasury of the sterling equivalent of foreign income—except to the extent that they became available for use in the United Kingdom (see the Financial Powers (United States of America) Securities Act, 1941, s. 2 (7), and the regulations made under section 3 of that Act, the United States of America Securities (Income Tax Relief) [S.R. & O., 1941, No. 1563]).

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[4] [1902] A.C. 287; 4 T.C. 464.
[5] (1911–12) 6 T.C. 34.
[6] (1935) 19 T.C. 582.
[7] (1895) 3 T.C. 443.
[8] [1935] 1 K.B. 499; 19 T.C. 33.
[9] [1938] 2 K.B. 25; 21 T.C. 677.
[10] 6 T.C. 34.
[11] [1938] 2 K.B. 25.
[12] [1936] 1 K.B. 645.
[13] [1938] 2 K.B. 25, 44.

In *Inland Revenue Commissioners* v. *Gordon* [16] the issue was not whether income had been received or transmitted, but whether the operations came within any of the heads of rule 2 of Case V, and it was held that they did not.

In the present case the sale of the cheque to the bank resulted in a "remittance payable in the United Kingdom" under paragraph (*a*) of rule 2. The dollars are remitted to the bank and the sterling equivalent is credited to the taxpayer, so that he has received the income from the remittance. It is payable where the cheque is negotiated, though the actual drawing may be elsewhere. Secondly, the taxpayer imported the dollar content into the United Kingdom when he filled up the cheque for which he got money's worth in sterling against the claim for dollars in New York. Thirdly, money or money's worth has been imported. If it is accepted against the Crown that the dollars have not been imported, but only the claim for them, then the money or value arises in the United Kingdom without being imported, and so paragraph (*c*) covers the case. Paragraph (*d*) also covers the transaction. This is money received on account of " such " remittances. The transaction, therefore, comes under each of the sources in Case V. Unlike *Timpson's* case,[17] this taxpayer directed that the income should be spent on himself. It would be paradoxical if there should be liability to tax where there is a gift to a child but not if the proceeds are to be spent on the drawer of the cheque.

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[14] [1938] 2 K.B. 25.

[15] Finance Act, 1938, s. 24: "Where in any year of assessment "the owner of any securities . . . "sells or transfers the right to receive "any interest payable . . . without "selling or transferring the securities, "then, for all the purposes of the "Income Tax Acts, that interest, "whether it would or would not be "chargeable to tax apart from . . . "this section—(*a*) shall be deemed to "be the income of the owner . . . for "that year. . . . (3) Provided that, in "any case where, if the interest had "been chargeable under Case IV or "Case V of Schedule D, the computation of tax would have been made "by reference to the amount received "in the United Kingdom, the tax "under Case VI shall be computed "on the full amount of the sums "which have been or will be received "in the United Kingdom in the year "of assessment or any subsequent "year in which the owner remains "the owner of the securities."

[16] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.

Foulsham v. *Pickles* [18] is distinguishable. The decision was that the income did not arise from possessions abroad and that, therefore, the taxpayer had been assessed under the wrong case.

F. N. Bucher Q.C. and *P. J. Brennan* for the respondent taxpayer. It is important to remember that this is a relieving provision for persons not domiciled in the United Kingdom, and it should not be used to extend the liability to tax unless the statutory provisions plainly apply. It is common ground that the two cases have the same ambit in affording this relief. On the authorities it is nihil ad rem that the taxpayer succeeded in enjoying his American income in this country: see *per* Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[19] with which Lord Normand agreed " in omnibus." Lord Cooper sums up the taxpayer's submission.[20] *Gresham Life Assurance Society Ltd.* v. *Bishop* [21] and *Norwich Union Fire Insurance Co.* v. *Magee* [22] show that it is not sufficient for the Crown to show that the taxpayer would not have had the money here if he had not had the resources abroad. They have to prove that the money received here represents the money piling up abroad for the taxpayer. The words " from thence " in the Act of 1842 should be read into the Act of 1918 because that Act was only a consolidating Act. Lord Tucker mentioned [23] *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Income Tax Commissioners for Trinidad and Tobago* [24] and said that he had difficulty in following the reasoning of the Privy

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[17] [1936] 1 K.B. 645.

[18] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261.

[19] 33 T.C. 226, 242.

[20] Ibid. 230.

[21] 4 T.C. 464.

[22] (1896) 3 T.C. 457.

[23] 33 T.C. 226, 235.

[24] [1945] A.C. 1; 61 T.L.R. 30; [1945] 1 All E.R. 9.

Council, and Lord Cooper pointed out [25] that the citation made by Lord Wright, delivering the judgment of the Board, in that case [26] from Lord Lindley's speech in *Gresham Life Assurance* v. *Bishop* [27] was irreconcilable with the majority opinion in that case. The court did not accept that any way by which one could get income in the United Kingdom by banking practice resulted in liability to tax. There must be importation of money or value. If the bank had acted as the respondent's agent in collecting the cheque from New York, the case could not be argued, but there is a clear finding that they were acting as principals vis-à-vis the taxpayer. That is a finding of fact: *In re Farrow's Bank.*[28] The bank did not have to inquire into the credit standing in the taxpayer's account in America. They were buying a mandate at its face value. They were not buying his income. The source of the sterling was the sale of the chose in action by the contract made with the bank. The source was not his income in New York. Lord Keith, after some hesitation, decided in the taxpayer's favour in *Inland Revenue Commissioners* v. *Gordon* [29] because he was not satisfied that the dollars were going to be brought home. In this case it is part of the Crown's submission that the dollars did not move from America, and, therefore, they have to rely on a remittance.

This is not a receipt. In *Gresham Life Assurance* v. *Bishop*,[30] in the Court of Appeal, each of the Lords Justices followed *Scottish Mortgage Company of New Mexico* v. *McKelvie*,[31] but in the House of Lords the reasoning was rejected, and that ought to have put the quietus to the concept of "constructive remittance." Lord Lindley's view was cited in *Inland Revenue Commissioners* v. *Gordon* [32] but was not accepted. In the present case everything was done before there was any depletion of the income abroad. Even if the taxpayer had no account there, the bank might still have paid him if they thought that he was a man of integrity. The position is covered by u.u.a. and u.u.r. In this case there is no nexus between the cheque and the American income, as is apparent from the irrelevance of fluctuations in the rate of exchange between the date of the sale of the cheque and the clearance. *Inland Revenue Commissioners* v. *Gordon* [33] shows that a link is necessary.

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[25] 33 T.C. 226, 231.

[26] [1945] A.C. 1, 11.

[27] [1902] A.C. 287, 296.

[28] [1923] 1 Ch. 41.

[29] 33 T.C 226, 233.

[30] [1901] 1 Q.B. 153.

[31] 2 T.C. 165.

[32] 33 T.C. 226.

[33] Ibid.

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To be liable to tax there must, first, be importation from abroad to the United Kingdom of something of value, being either income or representing it: *Hall* v. *Marians (No. 2)*.[34] The Crown say that that is obiter, but emphasis was placed on it by the House of Lords. Secondly, the thing imported must be income and not capital. Thirdly, the determination whether the thing is held on income account or is capital depends on the place it takes in the affairs of the particular taxpayer. There is no liability to tax unless the thing imported belongs to the taxpayer at the time when it is imported. It is not disputed that so long as the moneys were in the bank account in New York they were income, but whether the sterling received for them is capital or income can only be ascertained by reference to the affairs of the taxpayer. In *Timpson's Executors* v. *Yerbury*[35] the money continued to be Mrs. Timpson's, and when it was paid over voluntarily to the children it had to be treated as having been received by her. This is not, in the words of the Act of 1842, a remittance "from thence." In *Paget* v. *Inland Revenue Commissioners*[36] the source of the money was not the original promise of the Hungarian bank but the contract between the dealers and Miss Paget in London, and that could not be income. In the present case the source of the money was the contract made and to be performed in England. Section 24 of the Finance Act, 1938, has in effect given parliamentary blessing to the correctness of the decision in *Paget's* case,[37] and one should not be astute to draw fine distinctions between that case and this. The submission in this case does not imply that there is no content left to which Cases IV and V can apply. The argument for the Crown that the taxpayer, being resident though not domiciled here, had American income and received like value here and, therefore, is taxable under Cases IV and V was negatived in *Hall* v. *Marians (No. 2)*[38] and by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*.[39] Paragraph (*d*) is a sweeping up formula. "Such" is in italics to show that it is harking back to what goes before. If (*c*) induces liability without importation, then (*d*) does the same. It would be strange if paragraph (*c*) induced liability without importation, when the sweeping up formula does not.

The relief afforded by these provisions only applies to persons domiciled abroad in respect of income abroad. Wynn-Parry J.

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[34] 19 T.C. 582.
[35] [1936] 1 K.B. 645.
[36] [1938] 2 K.B. 25.
[37] Ibid.
[38] 19 T.C. 582.
[39] 33 T.C. 226, 237.

did not say that the test was whether the dollars were brought back. Admittedly, he did not deal with paragraph (*c*), but he evidently placed emphasis on the point that the transaction was between principal and principal. The mere fact that the benefit which the taxpayer got in the United Kingdom would be discharged by subsequent depletion of the New York account does not, on the authority of *Paget's* case,[40] bring this transaction within paragraph (*c*). In *Hall* v. *Marians* (*No. 2*)[41] Romer L.J. said that it might be different if it was contemplated that the benefits were to be discharged out of the money to be brought home in the future from the foreign banking account, but that was not in contemplation here. The House of Lords said that payment in the foreign bank was not enough to attract liability. The point was argued by Mr. Tucker in *Inland Revenue Commissioners* v. *Gordon*,[42] though the argument was abandoned. In *Hall* v. *Marians* (*No. 2*)[43] there was no evidence whether the rupees were remitted. In this case the dollars could not be remitted because of exchange control, but as the transaction between the taxpayer and the bank was one of principal and principal, even if the money had been brought to the United Kingdom, it would not have been the taxpayer's at the time of importation. The House of Lords in *Inland Revenue Commissioners* v. *Gordon*[44] shows that one should be cautious in accepting the proposition that normal banking practice necessarily results in a transmission: see *per* Lord Cohen.[45]

If there is to be liability, the thing imported must belong to the taxpayer at the time of importation: *Timpson's Executors* v. *Yerbury*.[46] *Carter* v. *Sharon*[47] is the logical converse of the analysis in *Timpson's* case.[48] The facts of the present case are more in the taxpayer's favour than they were in *Carter* v. *Sharon*.[49]

Brennan following. The expanded meaning given to "receipt" by section 10 of the Finance Act, 1956, for the purposes of Schedule E shows that previously, and still in Schedule D, it must be given a limited meaning. Having regard to the history of this legislation it is probable in 1799 that "value" meant "bullion."

Foster Q.C. in reply. The taxpayer assumes that there is no receipt in the United Kingdom because he looks at what happens in America when the bank deals with the cheque. It is submitted that, when the taxpayer filled up the cheque, there was a transmission in the account and in due course the dollars were debited. The authorities show that a receipt may be by a transmission in any form known to commercial banking. It is unnecessary to inquire whether the dollars are brought to the United Kingdom. The correspondents of the clearing bank in America presented the cheque and the dollars were credited to the Midland Bank in America. In effect the taxpayer sold the currency. It makes no difference whether the bank acts as principal or as a collecting bank, for the income has already been received by the taxpayer. It cannot be right to say that income is turned into capital when a holder in due course credits the amount of a cheque. The taxpayer sold the dollars in New York, not the right to receive them. The nature of the proceeds is still income. The tax is on the sterling into which the income has been transferred and it is immaterial what happens to the dollars; they are no longer income. The nexus is at the moment when the sale takes place, and the taxpayer is not concerned with what happens when the cheque is presented as part of the transaction. It does not affect the "receipt" by him. When the dollars are delivered to the correspondent of the bank, they come out of the account because they have been sold. [Reference was made to *Fellowes-Gordon* v. *Inland Revenue Commissioners.*[50]] In the present case the English banks sold to the Bank of England, but it cannot be said that they acquired dollars for themselves—because of exchange control. It is not relevant to consider the affairs of the taxpayer to determine whether the transaction has turned income into capital. The loan in *Hall* v. *Marians* (*No. 2*)[51] has no analogy with the present sale by the taxpayer. There was no loan here, though the transaction would have to be undone if the cheque was not met. In *Hall* v. *Marians* (*No. 2*)[51] the sale was not in this country but in Ceylon. It was easier there to say that there was no liability to tax. Paragraph (*c*) does not require that money or value should be deposited in the United Kingdom. "From thence" does not apply to paragraph (*c*).

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[40] [1938] 2 K.B. 25.
[41] 19 T.C. 582.
[42] 33 T.C. 226.
[43] 19 T.C. 582.
[44] 33 T.C. 226.
[45] Ibid. 241.
[46] [1936] 1 K.B. 645.
[47] 20 T.C. 229.
[48] [1936] 1 K.B. 645.
[49] 20 T.C. 229.

The Act of 1918 was admittedly a consolidating Act, but it is submitted that "from thence" was deliberately omitted and paragraph (*c*) was intended to cover the gap where property is not imported. It is only where the sale is abroad and the proceeds are credited abroad that there has to be importation to attract tax. If the money or value arises abroad, then (*d*) covers the case. (*c*) covers the case where the money or value arises in the United Kingdom but the property is not imported. In this case the value brought into the United Kingdom was the value of the dollars. The mandate to the New York bank to transfer the dollars was brought into the United Kingdom by filling up the cheque. There was then a transfer or receipt on account. It created a thing representing money just because the taxpayer had an account in America. The *Trinidad* case[52] shows that there can be a transmission by contra accounts. Paragraph (*c*) is not confined to " bullion." Remittances payable in the United Kingdom are those which can be paid in the United Kingdom. Otherwise (*a*) would not catch a remittance sent from New York where the cheque was expressed to be payable there. " Payable " means that which can be paid, that is, a negotiable instrument which is payable in the normal course of commercial negotiations.

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[50] (1935) 19 T.C. 683.

[51] 19 T.C. 582.

Cur. adv. vult.

March 9. JENKINS L.J. stated the facts, adding that it was common ground (1) that the income from the mother's estate until administration was complete was assessable under Case IV of Schedule D to the limited extent prescribed by rule 2 of the rules applicable to that case, and (2) that the remainder of the income was assessable under Case V of Schedule D but only to the limited extent prescribed by rule 2 of the rules applicable to that case. His Lordship read the relevant rules and continued:

The essential features common to all the transactions in question appear to have been these: (i) The respondent drew a cheque on his New York bank account for a specified sum in U.S. dollars in favour of the English bank (i.e., Seligman Brothers or the Midland Bank Ltd.). (ii) The respondent delivered this cheque to the English bank with a request that they should purchase it for the sterling equivalent of its amount in dollars at the current rate of exchange. (iii) The English bank acceded to this request, sold a like amount of dollars to the Bank of England or some other permitted purchaser and credited the respondent's account with them in London with the sterling equivalent of the amount of the cheque in dollars at the rate of exchange ruling on the day following their confirmation of the purchase, which would

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[52] [1945] A.C. 1.

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normally be the date of their sale to the Bank of England, or on the permitted market, of the like amount of dollars. (iv) The English bank sent the cheque by registered mail to their correspondents in New York with instructions (a) to have the cheque cleared on the respondent's New York bank account, (b) to credit the English bank's New York bank account with the resulting dollars, and (c) to pay out of the last-mentioned bank account the amount of dollars which had been sold to the Bank of England to the Federal Reserve Bank in New York for the credit of the account of the Bank of England.

The special commissioners' findings, to a great extent findings of fact, in regard to the character and effect of these transactions are summarised in paragraph 7 of the case stated. [His Lordship quoted from the paragraph which is set out above and continued:]

As to the sums sought to be assessed under Case IV of Schedule D as income received in this country from the mother's estate, the respondent's assessable income from this source is limited to "the full amount . . . of the sums which have been "or will be received in the United Kingdom in the year of assess-"ment. . . ." I take it to be plain beyond argument that in order to fall within this description the sum sought to be assessed must not only be received in the United Kingdom but must also be income, and furthermore must be "income arising from secu-"rities out of the United Kingdom" within the meaning of Case IV of Schedule D. This means, I think, that the income in question must originate abroad as the product of securities outside the United Kingdom and be received in the United Kingdom from abroad. Here there is no doubt that income arose to the respondent from his mother's residuary estate under the New York trust to which it was subject, and was received by the respondent as and when it was paid into his New York bank account by the executors or trustees. But it was received by him in New York and not in the United Kingdom and consequently did not attract tax. To make it taxable under Case IV it must be shown to have been in some way brought into the United Kingdom and to have been there received by, or to the order of, the respondent.

Similar considerations apply to the sums sought to be assessed under Case V as income received in this country from the mother's estate since the completion of the administration, and from the father's estate, or in other words as income from possessions of the respondent out of the United Kingdom, though the language of rule 2 of the rules applicable to Case V differs from that of rule 2 of the rules applicable to Case IV, in that it describes the assessable income as the full amount of the actual sums annually received in the United Kingdom from a number of specified sources of which the first, and the only one I need consider at this stage, is " from remittances payable in the United Kingdom."

That expression appears to me to be directed to any sum belonging to the taxpayer and being income from some foreign possession of his which is brought to the United Kingdom from a place outside the United Kingdom by means of a remittance entitling the taxpayer (or some other person to his order) to receive payment in the United Kingdom of the sum in question.

In each of the transactions under review the only sum received by the respondent was the purchase price in sterling of the cheque sold to the English bank, which purchase price was paid to the respondent in London, pursuant to a contract made in London, by the English bank. The commissioners held, and there was, in my view, ample evidence upon which they could hold, that in each case the English bank acted as a principal and not as a collecting agent, and, in my view, it would be wrong for us to disturb that finding.

The question with respect to each transaction must then be whether by drawing the dollar cheque on his New York account in favour of the English bank, and selling it to the English bank for sterling in London, the English bank acting as principal and not as collecting agent, the respondent received in the United Kingdom out of his bank account in New York the sum of dollars specified in the cheque, converted into sterling at the appropriate rate of exchange. Unless constrained by authority to hold otherwise I would answer that question in the negative.

It is clear that in actual fact none of these transactions involved the transfer of any sum from the respondent's bank account in New York to, or to the order of, the respondent in the United Kingdom. The price in sterling received by the respondent for the cheque from the English bank in London clearly did not come from the respondent's bank account in New York. The amount in dollars received by the English bank on presenting the cheque for payment at the respondent's bank in New York did, of course, come from his account with that bank. But it was received at that bank in New York by the English bank and not by or to the order of the respondent in the United Kingdom. It was no part of the bargain that the amount so received by the English bank should be brought into the United Kingdom, and there is no evidence that it was so brought. If it was, it came to this country as money in which the respondent had no interest whatever, and which, accordingly, could not be his income for tax purposes.

But Mr. Foster, for the Crown, submitted that in each transaction the respondent by drawing the dollar cheque on his account in New York in favour of the English bank, and selling it to the English bank for the equivalent in sterling of its amount in dollars, brought to and received in the United Kingdom from his bank account in New York the sum in dollars specified in the cheque or the equivalent of that sum in sterling.

If my analysis of the facts is correct it seems to me, unless I am compelled by authority to hold otherwise, that this view cannot be supported. I would say that the amount received by the respondent in each case, though no doubt received by him in the United Kingdom, lacked the essential character of a sum brought to the United Kingdom from New York, and neither the sterling sum in question nor the cheque for which it was paid would appear to me to have constituted a remittance from New York payable in the United Kingdom.

Mr. Foster referred us to a number of authorities.

In *Timpson's Executors* v. *Yerbury* [1] payments by way of gift were made by the taxpayer to her children by means of bills of exchange drawn on London and paid for out of the income standing to her credit in her account with the trustees of a New York trust, under which she had a life interest, and it was held in the Court of Appeal that the amounts so remitted remained her income up to the date of the encashment of the bills of exchange in the United Kingdom on the ground that the amounts of the bills represented incomplete gifts, which she could have revoked at any time before the bills were cashed, and consequently, that she was taxable in those amounts as income to which she was entitled when it reached the United Kingdom. I do not see how this case advances the Crown's argument. It is plain that there were actual remittances of income from New York to the United Kingdom, payable in the United Kingdom, the only question being to whom the income so remitted belonged.

Conversely, in *Carter* v. *Sharon*,[2] the foreign trust in question was governed by Californian law under which the property in a sum remitted to the taxpayer's daughter became the absolute property of the daughter on the posting of the draft in California, with the result that the income brought to the United Kingdom was not income to which the taxpayer was entitled when it reached the United Kingdom. This decision appears to me to assist the respondent on the hypothesis that the proceeds of the cheques in the present case ultimately reached the United Kingdom, but to afford no support to the Crown's argument. As in *Timpson's Executors* v. *Yerbury*,[3] there was clearly an actual remittance from the place abroad to the United Kingdom of the amount of the draft, which was payable in the United Kingdom.

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[1] [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155.

[2] [1936] 1 All E.R. 720; 20 T.C. 229.

Some reliance was placed by Mr. Foster on *Scottish Mortgage Co. of New Mexico* v. *McKelvie*,[4] where a company formed for the purpose of borrowing money in this country and investing it abroad at higher rates of interest was treated for the purposes of Case IV of Schedule D as having received in this country from America sums which, though in fact raised in this country by the issue of shares and debentures and from depositors, it dealt with in its books here as profits from its American investments and applied as such. That case, now of doubtful authority, was used by Mr. Foster for the purpose of extending to mere book entries the proposition which (within due limits) I fully accept, that funds can for tax purposes be considered as having been remitted to this country from abroad, where the transaction is carried out by debiting a foreign account and crediting an account here by means of a cheque, bill or draft in accordance with ordinary banking procedure, without any actual or physical transfer of currency to this country from abroad.

For the same purpose Mr. Foster referred us to the case in the House of Lords of *Gresham Life Assurance Society Ltd.* v. *Bishop*,[5] where an assurance society included in its yearly statement of accounts in this country interest received abroad but not, in fact, remitted to this country, and such interest was held not to have been received in the United Kingdom within the meaning of Case IV. In particular, Mr. Foster relied on the following passage from the speech of Lord Lindley[6]: "My Lords, I agree "with the Court of Appeal that a sum of money may be received "in more ways than one, e.g., by the transfer of a coin or a "negotiable instrument or other document which represents and "produces coin, and is treated as such by business men. Even a "settlement in account may be equivalent to a receipt of a sum "of money, although no money may pass; and I am not myself "prepared to say that what amongst business men is equivalent

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[3] [1936] 1 K.B. 645.

[4] (1886) 2 T.C. 165.

[5] [1902] A.C. 287; 4 T.C. 464.

[6] [1902] A.C. 287, 296.

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"to a receipt of a sum of money is not a receipt within the "meaning of the statute which your Lordships have to interpret."

But those observations are subject to this important qualification, conveyed by Lord Lindley in the immediately following words [7]: "But to constitute a receipt of anything there must be "a person to receive and a person from whom he receives, and "something received by the former from the latter, and in this "case, that something must be a sum of money. A mere entry "in an account which does not represent such a transaction does "not prove any receipt, whatever else it may be worth."

I would also refer to this passage from the speech of the Earl of Halsbury L.C.[8]: "Now, here the money has not actually been "received in this country. It is to be observed that the legislature has assumed, by the distinction which it has made between "the mode of ascertaining the amount payable generally upon "the balance of gains and profits, and the amount taxable in "respect of the interest payable upon foreign investments, that "it has earmarked that sum and made it subject to distinct and "peculiar incidents. The difficulty of identifying the actual sum "is no limit on the enactment. The legislature must be supposed "to have contemplated the possibility of drawing a distinction "between money received in this country and money accounted "for or credited in account. If it were not for the difficulty of "earmarking money, I should think no one would have any doubt "that the money must be received in this country to bring it "within the words of the statute. If it were not money but some "commodity, say tobacco, which a trader carrying on business in "London and Paris was accounting for to his London house, no "one would say that, though the Paris tobacco was credited in "account as a set-off against some expense or something that "the supposed London firm had to set-off against the same claim, "and that as the London firm was paid by the Paris tobacco, "therefore the tobacco was liable to the import duty on tobacco "because it was taken into account in the books of the London "firm.

"In no way that I can give any reasonable interpretation to "has the money reached this country or been received in this "country. It, like the tobacco in the case suggested, has not "been imported, and if the legislature had intended that bringing "it into account was to be equivalent to its being received, it "would have been easy to say so. It cannot be said that the use

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[7] [1902] A.C. 287, 296.

[8] Ibid. 291.

"of artificial meaning to be attached to ordinary language is either "unknown or unusual in legislation; and if it was intended to "make this a special subject of taxation to be taxed whenever "and wherever an equivalent amount was credited or booked or "in any other way recognised as having come under the dominion "of the owner in this country, nothing could have been easier "than to enact it in plain terms."

Lord Macnaghten said[9]: "I do not understand what is "meant by constructive receipt in such a case as this, or how "any sums can be said to have been received in the United "Kingdom unless they have been brought to the United King-"dom, or unless there has been a remittance 'payable in the "'United Kingdom,' to borrow the language of the rule applic-"able to the fifth case."

And[10]: "As my noble and learned friend Lord Robertson, "when Lord President, observed in *Forbes* v. *Scottish Provident* "*Institution*[11]: 'Every man and every company having foreign "'or colonial investments of course knows of the interest arising "'from them, takes note of it, and enters it in any statement "'of affairs which may require to be made up.' But that, as "I think, and as the Lord President thought, is a very different "thing from bringing the interest home—a very different thing "from the receipt of the money here, either in specie or as "represented by a remittance payable in this country."

Lord Macnaghten went on to distinguish the New Mexican case [*Scottish Mortgage Co. of New Mexico* v. *McKelvie*[12]] as a very special case.

Lord Shand (on the same page) said[13]: "It is true that the "appellants received the interest on their foreign securities by "the hands of their agents abroad. But I think it is equally "true that, as they left that interest where it was gained, it "was never received in this country. When it was entered in "the company's balance sheet in order to the ascertainment of "the profits of the year, it was so entered as estate which had "not been received in England, but as property belonging to "the company which they acquired abroad, which had not been "brought home or received here, but which was part of their "foreign assets. Interest on securities in that position was pro-"perly taken into account in the ascertainment of the year's "profits, not because it had been received in England, but

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[9] [1902] A.C. 287, 292.

[10] Ibid. 293.

[11] 3 T.C. 443, 456.

[12] 2 T.C. 165.

[13] [1902] A.C. 287, 293.

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"because, although not so received, it was part of assets of value "which the company had acquired and held abroad. In the "Scottish case of the investment company of New Mexico, the "species facti was different, for there the company treated the "money as received in this country, and merely saved themselves "the expense of cross remittances. It appeared there that the "company was not entitled to divide the money earned abroad "unless it was received as profits in this country. It was "treated as so received merely to avoid the expense and inconvenience of cross remittances, money sent home and the same "amount sent back by cross cheques or drafts. That was a "material point in the decision of the case as showing that the "money had been really received in this country."

Lord Brampton said[14]: "My Lords, it is conceded that "no part of the money in question was ever received in the "United Kingdom in specie or in any form known to the "commercial world for the transmission of money from one "country or place to another. But it was argued that if not "actually it was 'constructively' so received in the accounts "of the society. I confess I do not like that expression, nor "do I quite understand what it means. If a 'constructive' "receipt is the same thing as an actual receipt, I see no reason "for the use of the word 'constructive' at all. If it means "something differing from or short of an actual receipt, then "it seems to me that a constructive receipt is not recognised "by the statute, which, in using the word 'received' alone, "must be taken to have used it having regard to its ordinary "acceptation."

At the end of his speech Lord Brampton doubted the correctness of the *New Mexico* case,[15] and expressed the view that if sound it was distinguishable.

A somewhat similar case was that of *Forbes* v. *Scottish Provident Institution*,[16] referred to with approval by Lord Macnaghten in the *Gresham Life Assurance Society's* case.[17] I quote from the headnote[18]: "A Scottish Mutual Life Assurance Society "lends out sums of money in Australia on interest. The interest "accruing is not remitted to the United Kingdom in forma "specifica, but is retained abroad and invested. It is, however, "entered in the revenue account of the society as received. "Held, that interest not received in the United Kingdom is

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[14] [1902] A.C. 287, 294.

[15] 2 T.C. 165.

[16] 3 T.C. 443.

[17] [1902] A.C. 287.

[18] 3 T.C. 443.

"not assessable to income tax and that the facts in these cases "do not amount to constructive remittance."

Lord Robertson, Lord President, said [19]: "The phrase 'con-"'structive remittance' in the second query in these cases is "one which, if used at all, requires to be carefully guarded. "As employed in the present argument, it would practically "obliterate the limitation in the rule of Case IV."

Immediately after the passage quoted by Lord Macnaghten. the Lord President said [20]: "But this will never make interest "'received in the United Kingdom.' The *New Mexico* case [21] ". . . was totally different. The money there could only be "said not to have been received, if money sent home by bill "is not received in this country, or if no colonial interests are "received in the United Kingdom which do not reach it in "specific form."

In *Scottish Provident Institution* v. *Farmer* [22] a life assurance society invested abroad in bearer bonds income arising from foreign and colonial securities in America, sent the bonds to this country and in due course sold them, the proceeds of sale being received by the society at its head office in this country, and it was held that the bonds were chargeable under Case IV of Schedule D in the year in which they were realised.

Mr. Foster invited us to hold that the cheques drawn by the respondent on his New York bank in favour of the English banks in the present case were equivalent to the bearer bonds in the case just cited and that the proceeds of sale of the cheques received by the respondent from the English banks in the present case were equivalent to the proceeds of sale of the bonds in that case. I cannot agree. The bonds in *Scottish Provident Institution* v. *Farmer* [22] were investments made out of the American income and accordingly in the most direct sense represented that income. They were physically remitted from America to this country, and actually realised here. On the other hand the cheque in each of the transactions with which this case is concerned was an order on the respondent's bank in New York to pay dollars to the English bank in New York out of the funds standing to the credit of the respondent's New York bank account, and the sum in sterling paid by the English bank for the cheque was paid for the right to receive the dollars in New York from the respondent's bank there on presentation of the cheque to that bank. In *Scottish Provident*

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[19] 3 T.C. 443, 456.

[20] Ibid.

[21] 2 T.C. 165.

[22] (1911–12) 6 T.C. 34.

Institution v. *Farmer*[22] the income was brought to this country from America. In the present case it was not so brought.

In *Kneen* v. *Martin*[23] it was unsuccessfully sought to charge a person resident but not domiciled in this country with tax on sums remitted to this country.

Finlay J. said[24]: "The Attorney-General pointed out, and "pointed out most forcibly, that you might have cases where "income was received and then the income was remitted, not, "of course, in the actual cash or cheque received, but remitted "by the purchase of a bond or some such method as that. I "do not for a moment doubt that if one can see in any particular case that the sum remitted is income, even though "it has, for purposes of being remitted, changed its form, then "in that event it would remain income and would attract tax. "Having said that and having indicated, as I do desire to indicate, that this case to my mind proceeds, as indeed the "special commissioners thought, very largely upon its own facts, "upon those facts I agree, on the whole, with the conclusion "at which they arrived, and therefore this appeal is dismissed."

In the Court of Appeal Romer L.J. said[25]: "I agree. Considering, first of all, rule 2 of the rules applicable to Case V, "the point that has to be determined is whether, when the "rule refers to the 'actual sums annually received in the United "'Kingdom,' it means sums representing income or whether it "means sums whether representing income or representing "capital. It is to be observed that whether we construe the "word 'sums' in the one way or in the other, those sums "are equally capable of being sent to this country in any one "of the four methods, or the three methods, that are referred "to in the rule. They can be sent in the form of remittances "payable in the United Kingdom, or in the form of property "imported, or in the form of money or value arising from "property not imported. Those words, therefore, throw no "light whatsoever on the question of what the meaning of "the word 'sums' may be."

And later on the same page he said: "I am clearly of "opinion that the word 'sums' in both rules means, and means "only, sums representing income."

In *Hall* v. *Marians (No. 2)*[26] the facts were complicated, but very briefly they appear to have been of this nature. The taxpayer's wife had an overdraft at the head office of the National Bank of India. She also had an account with the Colombo branch of the bank and that branch held for her certain Indian bonds in which income derived by her from a business carried on in Colombo was invested. The overdraft at the head office of the bank was made on the security of these bonds which, however, remained in Colombo. On her instructions the head office "transferred" the overdraft to Colombo (i.e., the amount was credited to her account in London and debited to her account in Colombo) and shortly afterwards the Indian bonds were sold in Colombo and the proceeds applied in paying off her overdraft at the Colombo branch.

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[22] 6 T.C. 34.

[23] [1935] 1 K.B. 499; 19 T.C. 33.

[24] 19 T.C. 33, 45.

[25] [1935] 1 K.B. 499, 514.

[26] (1935) 19 T.C. 582.

It was contended for the Crown that this transaction involved the remittance to this country from Colombo of income in the shape of the proceeds of sale of the bonds, such remittance having been made by the combined effect of the crediting to the lady's account in London of the amount of the overdraft, the debiting to her account in Colombo of the like amount, and the discharge of the resulting overdraft at the Colombo branch by the sale of the Indian bonds. The Court of Appeal, reversing Finlay J.'s judgment, rejected this contention.

Lord Hanworth M.R. said [27]: "To suggest that to attract "liability to tax there must be an actual remittance seems quite "to overlook the ordinary transactions of commercial men. The "probability is that if and so far as either goods or bullion pass "from one country to another it is only upon the totality being "reached that it can be shown in favour of which country the "account lies. If a good illustration is wanted of money which "was treated as a remittance although no money had actually "passed, an illustration is found in *Scottish Mortgage Company* "*of New Mexico* v. *McKelvie*.[28]"

After a citation from that case he said [29]: "That is a very "excellent illustration that it is not necessary that there should "be a remittance. If you are able to treat what is in your hands "as if it were a receipt of income, and if it is used as such, then "it is impossible to prevent the incidence of tax by saying that "in fact it had not been remitted."

I think Lord Hanworth M.R., in view of what he had just previously said, must be taken as meaning here "an actual "remittance."

[27] 19 T.C. 582, 597.

[28] 2 T.C. 165.

[29] 19 T.C. 582, 597.

After referring to the facts and to Lord Lindley's speech in *Gresham Life Assurance Society* v. *Bishop*[30] Lord Hanworth M.R. continued[31]: "Upon those facts, is it right to say that there "had been a remittance of a value or a credit in respect of that "debt? Is that the way in which this £2,912 was dealt with; "was it liquidated by a remittance in any form or in any value or "not? The commissioners obviously thought not, and I for my "part cannot find that there was a remittance to or a receipt "of something in the United Kingdom from what, of course, "obviously is a position outside it. Finlay J. came to the con"clusion that this money was used to extinguish a debt which "was here. That puzzles me rather. What money? It is quite "true that the money which was derived from the bonds when "they were so sold in May was used to liquidate the debt which "at that time had gone out to Colombo, but I find no materials "on which I can say that Mrs. Marians has, in the financial year "ending April 5, 1930, enjoyed the benefit of a remittance within "the many-headed categories which are to be found in rule 2 of "Case V. I find myself unable on any question of law to upset "the decision of the commissioners, which I think they had "abundant material for reaching. I think the right course, there"fore, is to restore their finding and conclusion as one which they "have come to on the questions of fact and were entitled so to "do, and in respect of which I do not find that they have in any "way misdirected themselves on a point of law."

Romer L.J. said[32]: "In other words, it appears to me that, "if she deliberately adopts a form like this, then she is entitled "to all the benefits that flow from the adoption of such a form and "that we are not entitled to say 'Oh yes, but in substance it is "'precisely the same thing as though she had adopted the other "'form and had had income remitted to this country'."

I fear my citations are becoming unduly long, and I will not refer at length to *Paget* v. *Inland Revenue Commissioners*,[33] which is fully cited in the judgment of Wynn-Parry J. I confess to some doubt as to whether it can be said in this case as in *Paget's* case[33] that the price paid for the cheque in each of the transactions now under review was a payment made to the respondent by the English bank for the purchase of a capital asset in the shape of the right to receive part of the income arising from the trusts in the United States. From the English bank's point of view the asset bought was simply the right to receive in New

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[30] [1902] A.C. 287.

[31] 19 T.C. 582, 598.

[32] Ibid. 602.

[33] [1938] 2 K.B. 25; 21 T.C. 677.

York the amount of the cheque in dollars out of the funds standing to the credit of the respondent's New York bank account. From the respondent's point of view the income paid into that account had already been paid by the persons liable to pay it, namely, the trustees of the United States trusts, and was lying in the bank in New York simply as an accumulation of income already received. I, therefore, prefer to decide this case simply on the issue whether the amount of the cheque in each transaction was ever brought into this country, or in other words remitted to this country from New York.

In a passage from his speech in *Foulsham* v. *Pickles*,[34] cited by the judge, but I think worth repeating, Lord Cave L.C., after reading rule 2 of the rules applicable to Case V, continued[35]: "From this rule it follows that, in order to be taxable under "Case V, an income arising from possessions out of the United "Kingdom must be received in the United Kingdom either "(a) from remittances payable in the United Kingdom, or "(b) from property imported into the United Kingdom, or (c) from "money or value arising from property not imported, or (d) from "money or value received on credit or on account of remittances, "property, money, or value brought to or to be brought into the "United Kingdom. The word 'remittances' (which recalls the "expression 'remittances from thence' in the corresponding rule "contained in the Act of 1842) clearly refers to money remitted "into the United Kingdom from outside. The other branches of "the rule all refer to property, money or value imported or "brought into the United Kingdom, and there are no words in the "rule which can comprise money arising and payable here. If so, "the inference is that money so arising and payable is outside the "rule, and so is not taxable under Case V at all."

This passage is of assistance not only as emphasising the general requirement that in order to be taxable under this case the item sought to be taxed must have been brought into the United Kingdom from abroad, but also as indicating that the third of the sources referred to, viz., "from money or value arising "from property not imported," is not excepted from this general requirement. If that is so, it follows that Mr. Foster must fail in a subsidiary argument raised by him to the effect that in each of the present transactions (so far as the claim in respect of it is based on rule 2 of the rules applicable to Case V), the sterling payment made by the English bank in London for the dollar cheque was income arising from possessions out of the United Kingdom in the shape of a sum received in the United Kingdom from " money or value arising from property not imported " within the meaning of the rule. Clearly, the sterling payment was received by the respondent in the United Kingdom, but clearly, also, it arose in the United Kingdom and was not brought into the United Kingdom from abroad.

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[34] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261.

[35] [1925] A.C. 458, 464.

This last point was adverted to by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[36] where the House of Lords on broadly similar facts came to the same conclusion as had been reached by the Court of Appeal in *Hall* v. *Marians* (*No. 2*).[37] I respectfully adopt the view tentatively expressed by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*.[38] It is fully set out in the judgment of the judge, and I need only cite the concluding sentence: " I incline, therefore, to the view that to succeed under " the rule in respect of sums received from the third source, the " Crown must establish that the money or value had been brought " or was to be brought into the United Kingdom."

I am fortified in my adoption of Lord Cohen's view by the consideration that it appears to me to accord with Lord Cave's analysis of rule 2 of Case V in *Foulsham* v. *Pickles*.[39]

Mr. Foster referred to the Financial Powers (United States of America) Securities Act, 1941, and the United States of America Securities (Income Tax Relief) Regulations made thereunder (S.R. & O. 1941, No. 1563) as throwing light on the construction and effect of the rules applicable to Cases IV and V of Schedule D. Speaking for myself, I have been unable to derive any assistance from this later legislation for the purposes of the matter in hand.

It appears to me that the fallacy underlying Mr. Foster's main argument is this. He said that money can be remitted or brought to the United Kingdom from abroad by creating a credit here and a debit abroad. He said that in each of the present transactions what was done resulted in the respondent being credited by the English bank in London with a sum representing the purchase price in sterling of the dollar cheque, and in the respondent's account with his bank in New York being subsequently debited with the amount of the dollar cheque when presented. He would, therefore, have us conclude that there was a remittance or transfer of the dollars or their sterling equivalent from New York to London. But I fail to see how the transaction, merely because it was carried out by means of a credit in London and a later debit in New York, could amount to a remittance or transfer of the dollars or their sterling equivalent from New York to London unless it would have done so if carried out by physical means as opposed to book entries. Suppose A, proposing to visit the United States, wants to have dollars available to him there, and suppose his friend B wants sterling to spend in London, and is possessed of dollars lying in the form of currency in a safe deposit rented to him in New York, both parties being resident here. A and B agree that A shall pay B in London the sterling equivalent of $1,000, and in consideration of such payment B shall give A the key of his safe deposit box in New York with an authority to take from the box $1,000 in currency for his own use and benefit. The transaction is duly carried out, so that A collects from the safe deposit the $1,000, the whole of which he proceeds to spend in the United States. As a result of this transaction have the dollars been remitted or brought into this country? I should say clearly not. A would have bought from B in London under a contract entered into, and for a payment made, in this country, dollars lying in New York, and would have received and spent those dollars in America. Conversely, B would have sold those dollars to A in London under the contract and for the payment so made, the payment arising wholly in this country. The transaction I have supposed appears to me to be as nearly as possible the equivalent of any one of the transactions now in question, carried out by physical means as opposed to book entries, and I do not see why the difference in the machinery adopted should affect the result.

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[36] 33 T.C. 226; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866.

[37] 19 T.C. 582.

[38] 33 T.C. 237, 239.

[39] [1925] A.C. 458.

It is, no doubt, true of each of the transactions with which we are here concerned, that substantially the same result was produced as if the English bank had collected the amount of the dollar cheque in New York as agent for the respondent, and had then, as such agent, paid or credited to the respondent in this country the sterling equivalent of the dollars so received, and that if the transaction had taken that form the consequences in point of liability to tax under Case IV or Case V might well have been different.

But this appears to me to be irrelevant. The transaction must for tax purposes be taken as it is. I repeat what was said by Romer L.J. in *Hall* v. *Marians* (*No. 2*)[40]: "In other words, it

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[40] 19 T.C. 582, 602.

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"appears to me that, if she deliberately adopts a form like this, "then she is entitled to all the benefits that flow from the adoption of such a form and that we are not entitled to say 'Oh yes, "'but in substance it is precisely the same thing as though she "'had adopted the other form and had had income remitted to "'this country.'"

The contention that these transactions involved in each case a constructive receipt by the respondent in this country from his bank account in New York of the sterling equivalent of the amount of the cheque in dollars in my view cannot be supported. On this branch of the argument I would respectfully adopt the observations quoted above of Lord Macnaghten and Lord Brampton in *Gresham Life Assurance Society Ltd.* v. *Bishop*[41] and of Lord Robertson, Lord President, in *Forbes* v. *Scottish Provident Institution*[42] and also those of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon.*[43]

One minor transaction of a different kind from those so far described requires brief consideration. It appears that in December, 1948, the respondent received in this country through the post from the United States Treasury a cheque in his favour for $908.19 representing a refund of United States federal tax and forwarded it to Seligman Bros. with instructions "to convert this "into sterling," which instructions Seligman Bros. carried out by purchasing the cheque and crediting the respondent with the sterling equivalent. It was not seriously disputed that this transaction, which was of a wholly different character from the others, did involve a remittance to this country from the United States of the amount of the cheque sent through the post from the United States Treasury to the respondent in this country.

For the reasons I have endeavoured to state, I am of opinion that on the facts found the special commissioners came to a correct conclusion in law which was rightly upheld by the judge.

Accordingly I would dismiss this appeal.

ROMER L.J. In *Foulsham* v. *Pickles*[44] Lord Cave L.C. classified the ways in which income can be "received" for the purposes of Schedule D, Case V, of the Income Tax Act, 1918. Having referred to rule 2 he said[45]: "From this rule it follows "that, in order to be taxable under Case V, an income arising "from possessions out of the United Kingdom must be received

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[41] [1902] A.C. 287, 292, 294.

[42] 3 T.C. 443, 456.

[43] 33 T.C. 226, 242.

[44] [1925] A.C. 458.

[45] Ibid. 464.

"in the United Kingdom either (a) from remittances payable in "the United Kingdom or (b) from property imported into the "United Kingdom or (c) from money or value arising from property not imported or (d) from money or value received on credit "or on account of remittances, property, money or value brought "or to be brought into the United Kingdom."

Whatever, then, the position may be under head (c), the taxpayer in the present case is not chargeable in respect of his American income except to the extent that it is brought or is to be brought into the United Kingdom in one of the three other ways which Lord Cave specified. This element of importation was referred to by Lord Macnaghten in *Gresham Life Assurance Society Ltd.* v. *Bishop*[46] as "bringing the interest home," and was clearly recognised by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*[47] when he said[48]: "It is plain from the "wording of the rule that sums cannot be said to be received in "the United Kingdom from the first, second or fourth sources "unless the source was itself payable in, imported into, or brought "or to be brought into the United Kingdom."

A further principle which it is necessary to bear in mind in the present case was enunciated by Romer L.J. in *Hall* v. *Marians (No. 2)*,[49] as follows: "If, by having capital remitted to this "country she (the taxpayer) escapes payment of income tax, she "is entitled to do so, although in the end she is in precisely the "same financial position as though she had had income remitted. "In other words it appears to me that, if she deliberately adopts "a form like this, then she is entitled to all the benefits that flow "from the adoption of such a form and that we are not entitled "to say 'Oh yes, but in substance it is precisely the same thing "'as though she had adopted the other form and had had income "'remitted to this country.'"

Allied to this principle it is well settled that rule 2 only applies where there has been actual receipt of foreign income here; there is no such thing as "constructive receipt" under the rule.

"In those circumstances," said Lord Cohen in *Gordon's* case,[50] "to hold that there was a remittance to London in the "present case would, I think, be to disregard the warnings given "by Lord Halsbury L.C. and Lord Macnaghten in *Gresham Life* "*Assurance Society Ltd.* v. *Bishop*[51] . . . not to be led astray

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[46] [1902] A.C. 287.
[47] 33 T.C. 226.
[48] Ibid. 238.
[49] 19 T.C. 582, 602.
[50] 33 T.C. 226, 242.
[51] [1902] A.C. 287.

"by an equivalent to a remittance or receipt or a constructive "receipt."

It cannot, I think, be fairly suggested that the sterling credits which Mr. Moyse received from the London banks to whom he sold his American cheques during the relevant years were within heads (b) or (d) of Lord Cave's four categories, but the Crown contends that the sums were taxable as remittances payable in the United Kingdom (head (a)) or as money or value arising from property not imported (head (c)).

In the light of the principles to which I have already referred, Mr. Moyse is not taxable under head (a) unless upon an analysis of the actual transactions into which he entered with the London banks he is shown to have received, actually and not constructively, American income of his which was brought, or which was to be brought, into the United Kingdom. Unless this is shown, he is not taxable upon "remittances"; nor is he so taxable if what he received was no more than the equivalent of a remittance.

It accordingly beomes necessary to examine the form which the relevant transactions took upon the facts as found by the special commissioners. Mr. Moyse had at all material times dollars standing to his credit at his New York bank and these dollars represented income which had been paid into his account at that bank by the trustees of certain American trusts under which he was a beneficiary. The New York bank were accordingly debtors to Mr. Moyse in an amount represented by the dollars which from time to time stood to his credit in their books. Mr. Moyse, though domiciled in the United States of America, was resident in this country. Subject to the exchange control regulations he could at any time and in various ways have had his dollars remitted to him or to his order here; and had he done so, there can be no doubt but that the dollars so remitted would have been chargeable to tax under Case V. Instead of doing that, however, he drew cheques on his dollar account in the New York bank and sold those cheques to the London banks, who paid him for them here in sterling. The special commissioners found that these transactions between Mr. Moyse and the London banks were transactions as between principal and principal and not as between principal and agent; in other words, they found (and the finding has not been challenged by the Crown and could not very well be) that Mr. Moyse was the seller of the cheques and the London banks were the buyers. What changes were effected in the position of the various parties concerned as a result of these transactions of sale and purchase? They would appear to be as follows:

(i) Sums of sterling, formerly the property of the London banks, became the property of Mr. Moyse.

(ii) The London banks became entitled to call upon the New York bank to pay them the amount of dollars for which the cheques were drawn.

(iii) The New York bank could and must, on presentation of the cheques, pay those dollars to the London banks instead of paying them to Mr. Moyse.

(iv) So far as Mr. Moyse was concerned, each transaction was entirely closed on payment to him of the sterling consideration except in the very improbable event of his cheques being dishonoured in New York.

In these circumstances, can it be said that the receipt by Mr. Moyse in London of the sterling sums constituted a receipt by him of American income brought or to be brought into the United Kingdom? The question is not an easy one, but for myself I think it must be answered in the negative. Mr. Moyse never directed the New York bank to remit any money to him here either as dollars or in the form of sterling. Nor did he direct the bank to remit the dollars to the London banks in this country as his agents. Had he done so, he would no doubt have been taxable on the amounts so remitted (*Timpson's Executors* v. *Yerbury* [52]). The London banks, however, could (and in fact did) receive payment of the dollars in the United States of America. Eventually, no doubt, and via the Bank of England, they received sterling in this country which represented the dollars which they or their agents in the United States of America acquired from the New York bank on presentation of Mr. Moyse's cheques; but by that time the transaction, as I have already said, had been closed so far as Mr. Moyse was concerned and he had no interest whatever in the sterling which was paid by the Bank of England to the London banks, even assuming that the sterling was remitted to this country in one form or another from America. He had in effect assigned his legal right to the dollars to the London banks before any sterling or credit which represented them was brought into this country (compare *Carter* v. *Sharon* [53]).

Accordingly, having regard to the form which the transactions between Mr. Moyse and the London banks took, it does not seem to me that it can be said of the sterling sums which Mr. Moyse received that they were remittances of his American income payable in this country. It has been suggested, however, that these sums are taxable upon a view which was adumbrated in *Hall* v. *Marians (No. 2)*[54] by Romer L.J., where he said: "Had the bank in this country allowed her (the taxpayer) to "draw the £440 on account or in advance or in respect of sums "of money that they were expecting to receive in the future "from the bank in Colombo, representing income from her "foreign possessions, the matter would have been different, but "as I understand it this money, the money which she was "allowed to draw from the bank, was a loan from the bank "in its strict sense, and that is found as a fact by the special "commissioners."

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[52] [1936] 1 K.B. 645.

[53] 20 T.C. 229.

I respectfully agree with Lord Cohen in *Gordon's* case[55] in thinking that if the stated hypothesis had been actual fact, Romer L.J. would have decided *Marian's* case[56] in the opposite way. I do not, however, think that the observations which I have quoted are applicable to the facts of the present case. There is no reason to suppose that Mr. Moyse ever intended that his American income should be transmitted to him in this country at any time and he never, so far as I am aware, gave any instructions to the New York bank to that effect. So far as the London banks were concerned, the commissioners state that these banks knew nothing about Mr. Moyse's American income and were quite unaware that the dollars which they purchased from him represented income of his in the United States of America. In these circumstances it is difficult to see how they were allowing Mr. Moyse to draw sterling sums on account or in advance in the manner indicated by Romer L.J.

In my judgment, therefore, the commissioners and the judge were right in thinking that Mr. Moyse is not taxable under the first head of Case V, namely, on remittances payable in the United Kingdom; and it only remains to consider whether the sterling sums which he received from the London banks were "money or value arising from property not imported," and taxable as such. As to this, Lord Cave L.C. expressed the view in *Foulsham* v. *Pickles*[57] that the "money or value" under this head of charge is confined to money or value which is brought into this country even though the property from which it arises is not. This view was also taken by Lord Cohen in *Gordon's* case [58] and his Lordship gave cogent reasons to support it in his speech, which had the concurrence of Lord Normand. In these circumstances it would not, I think, be right for this court to put a different construction on the relevant language, even though we are not in strictness bound by the views which Lord Cave L.C., Lord Cohen and Lord Normand have expressed having regard to the fact that they were obiter. Accordingly, applying these views, Mr. Moyse is not chargeable under the third head of Case V; and as he is not, in my opinion, chargeable under the first head, I would dismiss the appeal.

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[54] 19 T.C. 582, 600.

[55] 33 T.C. 226, 240.

[56] 19 T.C. 582.

[57] [1925] A.C. 458.

PEARCE L.J. It is with the greatest diffidence that I express a view contrary to that of Jenkins and Romer L.JJ. I take some comfort from the thought that the solution of the problem can hardly be said to be obvious. For if the view which the respondent puts forward is correct, it seems that for over a century many persons have without protest paid tax for which they were not liable; and during that period the fact that tax liability under Cases IV and V can be avoided by a simple, normal and legitimate transaction has escaped the observation of the eagle-eyed.

The transactions in debate are those by which the respondent used, for the purposes of living in England, the income which was paid in dollars into his New York bank. He had many such dealings both with the Midland Bank in London and Seligman Bros., who are merchant bankers in the City of London. For convenience I will refer to them as "the English bank."

The respondent sent or presented to the English bank a cheque for dollars drawn on his New York bank account. The English bank bought the respondent's cheque, viewing the transaction as a purchase of dollars, and credited the respondent's account on the same or following day with the sterling equivalent of the dollars at the prevailing rate of exchange. Had the English bank been clearing the cheque by collecting it on the respondent's account, the credit would not have been made until some days later. It is conceded that in that case the respondent would have been liable to tax. In this case the bank was not acting as a collecting agent but dealing as principal with principal in a purchase of dollars.

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[58] 33 T.C. 226.

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The case finds that this practice of buying and selling cheques drawn in foreign currencies is a very old-established one in the City of London and is part of the normal banking business of the English bank.

The respondent was prohibited by the Exchange Control Act, 1947, from selling dollars to any person other than an authorised dealer, such as was the English bank. Having sold his cheque, the respondent was no longer concerned with it, save insofar as he would have been liable had it been dishonoured.

The English bank, who had thus become holders for value, sent the cheque to their New York correspondents, who had it cleared on the respondent's New York bank, credited the dollars so received to the English bank's account with them, and paid the dollars out of that account to the Federal Bank in New York for the credit of the Bank of England, to whom the dollars had been sold. The case is silent as to how, when or where the Bank of England paid to the English bank the sterling proceeds of the dollars.

Thus, the transaction consisted in the respondent selling for sterling in England dollar cheques drawn on his American income lying in a bank in New York. If that simple description is adequate, it would at first sight appear that he had to that extent received his American income in the United Kingdom, when one gives to the word "receive" its ordinary meaning. But one has to investigate the transaction more narrowly and consider the meaning of the word "receive" as defined by the cases. Without disregarding the substance of a commercial transaction, one has to consider its technical and exact form. Lord Simonds observed in *St. Aubyn* v. *Attorney-General*[59]: "The question is "not at what transaction the section is, according to some alleged "general purpose, aimed, but what transaction its language, "according to its natural meaning, fairly and squarely hits."

The English bank bought the cheque on the basis that the dollars would be paid out of the respondent's account at the New York bank on which the cheque was drawn by him. It can, in my view, hardly be said (as Mr. Bucher for the respondent argued) that there was no nexus between the respondent's dollars in his New York account and his sterling in England. He bought the latter with the former. In *Gresham Life Assurance Society* v. *Bishop*[60] Lord Brampton said[61]: "It is conceded that no "part of the money in question was ever received in the United

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[59] [1952] A.C. 15, 32.

[60] [1902] A.C. 287.

[61] Ibid. 294.

"Kingdom in specie, or in any form known to the commercial "world for the transmission of money from one country or place "to another."

It seems clear that, in his view, money transmitted in any form known to the commercial world to the United Kingdom from another country would have been "received" in the United Kingdom. Here the respondent wished to have for use in the United Kingdom in sterling the income which was lying in dollars in the United States. That necessitated some form of transmission. He achieved it by a normal and old-established commercial method.

But Mr. Bucher argues that to constitute a receipt in the United Kingdom within Cases IV and V: (a) there must be importation of something of value, and (b) that importation must be income or represent income (for both those points he relies on *Hall* v. *Marians (No. 2)*[62] and *Gordon's* case[63]). And (c) the thing imported must belong to the taxpayer at the time of importation (for this point he relies on *Timpson's Executors* v. *Yerbury*[64] and *Carter* v. *Sharon*[65]).

In this case, he argues, the blank cheque which the respondent brought to this country was itself worthless, the dollars never were imported into this country, and the fruit of his cheque, if it came back at all to this country, certainly did not belong to the respondent when it did so, since the respondent had already sold it.

He also argues that the dollar income of which the respondent sold part ceased to be income when it was sold and became capital: *Paget* v. *Inland Revenue Commissioners*.[66]

It is convenient to deal first with the question whether the American income of the respondent remained income after it was sold so that the proceeds of the sale were income. Undoubtedly the dollars in the American bank were income. But the proceeds of a sale of income may, in certain cases, constitute capital as, e.g., on the sale of annuity. The mere fact, however, that the income may alter in form does not prevent it retaining the quality of income. See *Scottish Provident Institution* v. *Farmer*,[67] where bearer bonds were bought abroad out of income and, when they were brought to this country and sold, the proceeds of sale were held to be income.

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[62] 19 T.C. 582.

[63] 33 T.C. 226.

[64] [1936] 1 K.B. 645.

[65] 20 T.C. 229.

[66] [1938] 2 K.B. 25.

[67] 6 T.C. 34.

In *Paget* v. *Inland Revenue Commissioners*[68] Miss Paget held Hungarian bearer bonds, the interest coupons of which were payable in London in sterling, and in certain other countries in the respective currencies of those countries. By a decree the Hungarian Government directed that the interest on the bonds should not be paid direct to creditors, but that its equivalent in pengos should be deposited with the Hungarian National Bank and placed in a foreign creditors' fund, out of which bond-holders might obtain payment of interest coupons in pengos, but only for use for certain purposes in Hungary. Miss Paget did not obtain payment in this way, but sold coupons, after they had fallen due, through coupon dealers in London, who deducted income tax on payment to her of the proceeds of such sales.

Miss Paget also held bearer bonds of the kingdom of Jugoslavia the coupons of which were payable in American dollars in New York. The Jugoslav Government gave notice of its inability to pay the interest in full and offered a composition either by payment in "blocked" dinars in Belgrade or by payment of 10 per cent. of their face value in dollars and by the issuing of funding bonds for the balance. Miss Paget did not accept this scheme but sold the interest coupons as in the case of the Hungarian bonds.

The Court of Appeal held that neither in the case of the Hungarian nor the Jugoslav bonds did the proceeds of the sale of coupons received by Miss Paget constitute income.

In neither case had the income passed to Miss Paget's hands nor was it at her disposal. On the Jugoslav bonds she was offered a choice between two methods of composition. In respect of the Hungarian bonds a sum of pengos representing interest of bond-holders (but only for use in Hungary) had been deposited in the Hungarian bank. That bank was not her agent to accept the deposit of such pengos on her account and though she could have got them if the Hungarian bank had sanctioned it, the income in the form to which she was entitled on the original terms of the bonds was not available to her.

Greene M.R. said[69]: "The purchase price received by Miss "Paget was not income arising from the bonds at all. It arose "from contracts of sale and purchase whereby Miss Paget sold "whatever right she had to receive such income in the future, "as well as her right to take what was offered by the defaulting "debtors."

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[68] [1938] 2 K.B. 25.

[69] Ibid. 35.

MacKinnon L.J. said[70]: "In both these cases the foreign "debtors had defaulted, and refused to pay the interest promised "by their bonds. Budapest offered to pay instead a certain "amount of pengos which could only be enjoyed as currency "within the limits of Hungary. Jugoslavia offered instead to "pay in dinars, or partly in dollars and partly in funding bonds. "What Miss Paget sold was the possibility of making more "money abroad upon the acceptance of these offers."

The coupons sold by Miss Paget did not represent income lying at her disposal. In my view the sale of rights to future interest and compositions offered by defaulting debtors is wholly different from the sale in our case of the respondent's income lying at his disposal in the bank. No other case was cited to us on this point. I think that that case is clearly distinguishable. Here the dollars constituted income before they were sold for sterling and the sterling proceeds were also income.

It is interesting to note that if the respondent's contention on the major point in the case before us is correct the sums realised by Miss Paget could not in any event have been received by her in the United Kingdom within the meaning of Case IV, since the foreign income in that case could not itself be brought into this country. But the case was not dealt with on those lines.

In dealing with the main point, namely, whether there was a receipt of his income by the respondent in this country, both sides relied on *Timpson* v. *Yerbury*.[71] In that case the taxpayer, who was resident in the United Kingdom, was a life tenant of income in New York. She directed the trustees in New York to pay allowances to her children living in the United Kingdom out of her interest in the income of the trust. They accordingly sent bills of exchange drawn on London either to the children or their bankers in the United Kingdom and debited the taxpayer's account with the equivalent in dollars of the sterling value of the bills.

It was held by the Court of Appeal that the amounts so remitted remained income of the taxpayer up to the date of the encashment of the bills of exchange in the United Kingdom and were, therefore, received by her there.

Lord Wright M.R. said[72]: "In fact it came in equity and in "the way I have stated as her income; however she chose to "apply it, whether to payment of debts or in purchase of valuable "things or services or as a voluntary allowance, it was income

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[70] [1938] 2 K.B. 25, 48.

[71] [1936] 1 K.B. 645.

[72] Ibid. 661.

"of hers to which she was entitled. Actual receipt by her would, "I think, be too narrow a condition of chargeability: no one "would doubt that she should in fairness be charged where the "income was applied in the country to the discharge of debts "or the acquirement of valuable things or interests, but I find "it difficult to bring such payments any more than gratuitous "payments like the payments in question within the charging "rule, if that rule is limited to cases where there is actual receipt "in this country by the taxpayer personally. But the test that "the taxpayer should be entitled to the income (provided, as I "here assume, that it comes as her income), whether she actually "receives it or not, appears to me to be in accordance both with "the language and the intent of the rules. Rule 1 of the miscellaneous rules applies to all cases under Sch. D and is aptly "framed, and is, I think, effective, to charge all income of the "taxpayer though the taxpayer never handles it himself, because "he applies the income before it reaches him, so that he never "actually receives it, though he disposes of it. What rule 2 of "the rules applicable to Case V, read with rule 1 of the miscellaneous rules, requires is that the actual sums of the taxpayer's "income should at least come to this country under such circumstances that the taxpayer, if he does not actually receive them, "is entitled to them, and these conditions were fulfilled in the "present case. I reserve for further consideration, in case the "question should ever arise, the question whether if income "accrues abroad either qua legal estate or qua equitable estate "to a taxpayer resident in this country, rule 2 of the rules "applicable to Case V and rule 1 of the miscellaneous rules "would make the taxpayer liable to charge, even though the "taxpayer disposed of his interest in that income before it was "received in the United Kingdom, so long as the actual sums "of that income were in fact received by the alienee in this "country."

Romer L.J. said [73]: "In computing the tax, therefore, sums "paid to third parties for the benefit or at the request of the "party so entitled have to be taken into account; and this is "only what one would expect."

Greene L.J. said [74]: "If this view be correct the fact that "the actual hands to receive in this country the money derived "from the remittances were those of the children appears to me "to be irrelevant, since provided the income in respect of which

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[73] [1936] 1 K.B. 645, 663.

[74] Ibid. 668.

"the assessment is made is income to which the person assessed "is entitled, it is, in my judgment, immaterial whether the sum "'received in the United Kingdom' is received by him or by "some third party upon his instructions."

In *Carter* v. *Sharon*[75] the question reserved by Lord Wright M.R. arose for decision. The facts were similar to those in *Timpson* v. *Yerbury*,[76] save that the gifts were made by bankers' drafts which by Californian law passed irrevocably to the donee at the latest when the drafts were posted in California. Lawrence J. distinguished the case from *Timpson* v. *Yerbury*[76] on the ground that in the latter case the Court of Appeal decided that the allowances to the deceased's children only became complete upon the receipt and encashment of the bills of exchange by the children, and that therefore at the time the income or the money came into the United Kingdom it was income to which Mrs. Timpson was entitled; whereas in the case before him the money had ceased to belong to the donor at the time when it came into the United Kingdom, and therefore she did not receive it in the United Kingdom.

The principle in those two cases is clear in so far as it applies to transactions of the kind that were there being considered; but the bearing of those cases on the transaction which we have to consider is not so clear. Mr. Bucher relies on them as showing that the money must belong to the taxpayer when it actually crosses the Atlantic. Mr. Foster contends that, as in *Timpson* v. *Yerbury*,[76] there was a complete gift completed when the donee cashed the bill of exchange, so in the case before us the dollars in the cheque were brought into the country when the respondent signed the cheque and were the property of the respondent until the bank actually cashed (or paid for) the cheque. If the taxpayer in *Timpson* v. *Yerbury*[76] received a bill of exchange when her child received and cashed it, a fortiori he argues, when the respondent cashed (i.e., received cash for) the cheque for himself, he must have received it.

In *Gresham Life Assurance Society* v. *Bishop*[77] the House of Lords held that interest on an investment abroad could not be held to be remitted to this country merely because it was included in an English insurance company's yearly accounts for the purpose of the triennial valuation on which profits were estimated.

The Earl of Halsbury L.C. said[78]: "I do not think any

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[75] 20 T.C. 229.

[76] [1936] 1 K.B. 645.

[77] [1902] A.C. 287.

[78] Ibid. 292.

"amount of bookkeeping or treatment of these assets wherever "they may be will be equivalent to or the same thing as receiving "the amount in this country. The words are simple, intelligible, "and represent an ordinary and simple thing. I cannot think "we ought to go beyond the words themselves."

And Lord Macnaghten said[79]: "I do not understand what "is meant by constructive receipt in such a case as this, or how "any sums can be said to have been received in the United "Kingdom unless they have been brought to the United King-"dom, or unless there has been a remittance payable in the "United Kingdom to borrow the language of the rule applicable "to the fifth case."

It is true that in *Scottish Mortgage Co. of New Mexico* v. *McKelvie*[80] book entries had been held to constitute a receipt when they were made to obviate the necessity of cross-remittances. Lord Macnaghten explained[81] the case in this way: "In that case, as it seems to me, in the transmission to this "country of money which the company was bound to reinvest, "the company acted as their own bankers and did for themselves "by an entry in their books what might have been done less "conveniently and less economically by an ordinary bank or "financial agent on their behalf."

Lord Lindley described[82] the case as "very peculiar. Money "received by the company's agents abroad was remitted to and "received by it here, and money here was treated by the com-"pany as remitted abroad in exchange for it. The exchange was "effected by a book entry but that entry was the business mode "of carrying out cross-remittances which it would have been "unbusinesslike and really childish to have effected in any other "way. But thinking as I do that McKelvie's case may be "properly upheld, I am not prepared to adopt it as a new starting "point for further inferences."

In *Hall* v. *Marians* (*No. 2*)[83] the facts are far removed from the facts of the case before us. The respondent's wife, living in London, was entitled to a share of profits of a business at Colombo. Those profits were paid to her account with the Colombo branch of a bank whose head office was in London and were invested in Indian bonds. From time to time she had borrowed moneys from the London branch on the security of the bonds. The amount of her loan account was debited to the

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[79] [1902] A.C. 287, 292.
[80] 2 T.C. 165.
[81] [1902] A.C. 287, 293.
[82] Ibid. 298.
[83] 19 T.C. 582.

Colombo branch which was instructed to realise securities to pay it off. The transfer was effected by cross-entries in the books of the two offices. A few weeks later the overdraft was discharged in Colombo out of the proceeds of the Indian bonds. Assessments under rule 2 of Case V were made on the ground that the extinction of the debt due to the bank by crediting the proceeds of the bonds constituted a receipt by the wife of a taxable remittance either when the advances were made or when her loan was transferred to Colombo. The Court of Appeal held that there had been no remittance to this country.

Lord Hanworth M.R. said [84]: "As I read rule 2 of Case V "it clearly indicates that there must have been in one form or "another something which amounted to a sum received in the "country."

After reading the rule he continued [85]: "To suggest that to "attract liability to tax there must be an actual remittance seems "quite to overlook the ordinary transactions of commercial men. "The probability is that if and so far as either goods or bullion "pass from one country to another it is only upon the totality "being reached that it can be shown in favour of which country "the account lies. If a good illustration is wanted of money "which was treated as a remittance although no money had "actually passed, an illustration is found in *Scottish Mortgage "Co. of New Mexico* v. *McKelvie*.[86] There there was a sum "lying outside this country of £500; there was a sum lying over "here of £500. The sum which was lying in this country was "treated as being income received, and the transaction was "wisely carried out without any remission of money, or, indeed, "drafts from one side to the other."

After quoting some observations of the Lord President, he continued [87]: "That is a very excellent illustration that it is not "necessary that there should be a remittance. If you are able "to treat what is in your hands as if it were a receipt of income, "and if it is used as such, then it is impossible to prevent the "incidence of the tax by saying that in fact it had not been "remitted."

He later quoted from Lord Lindley's words in *Gresham Life Assurance Society* v. *Bishop* [88]: "A sum of money may be "received in more ways than one, e.g., by the transfer of a coin "or a negotiable instrument or other document which represents

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[84] 19 T.C. 582, 596.
[85] Ibid. 597.
[86] 2 T.C. 165.
[87] 19 T.C. 582, 597.
[88] [1902] A.C. 287, 296.

"and produces coin, and is treated as such by business men. "Even a settlement in account may be equivalent to a receipt "of a sum of money although no money may pass; and I am "not myself prepared to say that what amongst business men "is equivalent to a receipt of a sum of money is not a receipt "within the meaning of the statute which your Lordships have to "interpret. But to constitute a receipt of anything there must "be a person to receive and a person from whom he receives, "and something received by the former from the latter, and in "this case that something must be a sum of money."

Romer L.J. said [89]: "It was suggested, I think, by Mr. Hills "in his argument that, having so borrowed it on the security of "sums representing her income in India, that was a sum which "must be deemed to have been or which was received by her in "the United Kingdom 'on credit or on account in respect of any "'such remittances,' and so on, as mentioned in the rule; in "other words, that the sum so borrowed was a sum received in "this country within the meaning of rule 2. I do not myself "take that view. Had the bank in this country allowed her to "draw the £440 on account or in advance or in respect of sums "of money that they were expecting to receive in the future from "the bank in Colombo, representing income from her foreign "possessions, the matter would have been different, but, as I "understand it, this money, the money that she was allowed "to draw from the bank, was a loan from the bank in its strict "sense."

It appears that Romer L.J. in the words I have read held the view that it was immaterial that the English resident received the money in advance and that the remittance came into the country at a later date. It seems to me with respect that that view is correct. If one applies Romer L.J.'s hypothesis to the case before us, the respondent would have been taxable if he had borrowed the sterling from the English bank "on account or in "advance or in respect of sums of money that they were expecting to receive in the future in London from the bank" in New York, representing income from his foreign possessions. If that be so, it would be a strange proposition to hold that, because instead of borrowing he bought the sterling by giving to the English bank the certainty (instead of the expectation) that they would receive the price from his New York income, he is *not* taxable—always provided that the English bank in fact ultimately received the proceeds of the cheque here.

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[89] 19 T.C. 582, 600.

And in the same case Maugham L.J. said[90]: "Liability to "tax therefore depends on the locality of the receipt; in other "words the liability in respect of the sums received whether they "are from remittances or from property imported or money or "value from property not imported or from the credits, mentioned "in the fourth possible method of remittance depends on the "place in which in a reasonable business sense the sums are "received."

Those words of Maugham L.J. are, in my view, important. The divergence of view in this case comes largely from differing views as to "the place in which in a reasonable business sense "the sums are received."

In a subsequent case, *Inland Revenue Commissioners* v. *Gordon*,[91] a similar transaction with regard to the transfer of overdrafts was considered. The House of Lords, like the lower courts, held that it was difficult to distinguish the case in any material respect from *Hall* v. *Marians* (*No. 2*),[92] and held that the transaction did not come within Case V. Lord Cohen[93] specifically dealt with the hypothesis of Romer L.J. to which I have referred and says: "Mr. Tucker" (for the Crown) "read "this passage as meaning that if the stated hypothesis had been "actual fact, Romer L.J. would have decided the case in the "opposite way. Romer L.J. does not express a concluded opinion "but I think it is a fair inference that he would have done so. "Even so I do not think his observations help Mr. Tucker, since "in the present case I am unable to trace any finding of fact that "the bank in England ever made the loan on account of or in "advance or in respect of money of the respondent representing "income which the bank were expecting to receive in England "from the branch in Colombo."

It will be seen that none of the cases deals with a transaction of precisely this nature. The principles which, as it seems to me, can be deduced from the cases to which I have referred are these. First, to bring a transaction within Case IV as received in the United Kingdom or Case V as received in the United Kingdom from remittances payable in the United Kingdom, income from abroad must have come to this country. Secondly, that income must have been received in this country by the taxpayer. It must therefore at some time in this country be in the possession of or at the disposal of the taxpayer. If he can direct its disposal he receives it in the person of the alienee. Thirdly, that money

[90] 19 T.C. 582, 602.
[91] 33 T.C. 226.
[92] 19 T.C. 582.
[93] 33 T.C. 226, 240.

may have come to this country in one of the ways in which money does come to a country in a commercial sense. It need not, of course, come in specie. It may, I think, start as dollars and arrive as pounds sterling. It may come by the transfer of a credit from a foreign bank or branch to an English bank or branch. But there must be such a transfer. Fourthly, the fact that the taxpayer receives the fruit of the income before its arrival is immaterial provided the income does in fact arrive: see Romer L.J.'s hypothesis. And in such a case it need not, as it seems to me, be his property when it arrives, since he has received the proceeds of it and directed the transfer.

It is true that *Timpson* v. *Yerbury*[94] and *Carter* v. *Sharon*[95] would at first sight appear to be authority for saying that the remittance must belong to the taxpayer when it actually comes into this country. On the facts of that case there would not otherwise have been any receipt at all in this country, since there had been no receipt in advance by the taxpayer. But in a case where the taxpayer receives the proceeds in advance on condition that the income itself arrives to reimburse the person who has lent such proceeds to the taxpayer or paid them as purchase price, I cannot see that principle demands that the remittance should actually be the property of the taxpayer at the time of transit. So to hold would be departing very far from the ordinary sense of the words "received in the United Kingdom," and I should be loth to do so unless compelled by authority. In my view no authority so compels me.

Applying these principles to the case before us, I think that the respondent by selling for sterling in London a cheque drawn on his foreign income received it in the United Kingdom, if it be shown that the foreign income later arrived in the United Kingdom. It need not arrive in dollars; it may arrive in pounds. It may arrive in any manner in which money is transmitted by banks. Nor need it be identified among a mass of banking transactions if the reasonable business inference is that it did so arrive. See the words of Lord Hanworth M.R. in *Hall* v. *Marians (No. 2)*[96]: "The probability is that if and in so far as either "goods or bullion pass from one country to another it is only "upon the totality being reached that it can be shown in favour "of which country the account lies."

The Bank of England bought the dollars. The proceeds of them must, I think, have been a sterling credit to the English bank standing in the books of the Bank of England. I have felt some doubt as to whether that is an inference one may rightly draw, but any other inference seems quite impracticable. As I understand the case, the whole transaction was based on the known fact that the English bank would have to sell the dollars to the Bank of England and out of the proceeds of that sale would recoup itself for the price paid for the cheque.

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[94] [1936] 1 K.B. 645.

[95] 20 T.C. 229.

[96] 19 T.C. 582, 597.

Thus the circle was complete. The English bank had in the United Kingdom from the respondent's dollars the sterling equivalent which (with a small profit to them) represented the sterling that they had already paid to the respondent. In my view, the respondent has received the relevant income in the United Kingdom within the meaning of Case IV. He has also, in my view, received the income from remittances payable within the United Kingdom within the meaning of Case V.

It was common ground to both counsel that the effect of Case IV and Case V on the transaction which we have before us is identical and that they can find no case where it has been held that the effect of the two cases differs.

While Case IV gives no particulars as to what is meant by "received," Case V gives particulars. Rule 2 of Case V, which has been already read by my Lord, provides that the tax shall be computed on the full amount of the actual sums annually received in the United Kingdom under four heads—(*a*) from remittances payable in the United Kingdom, or (*b*) from property imported, or (*c*) from money or value arising from property not imported, or (*d*) from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom. (I have inserted the letters for convenience of reference.)

Mr. Foster claims that in any event the relevant transactions must in the last resort come within the terms of (*c*) above, namely, the respondent's transaction must constitute a receipt in the United Kingdom of money or value arising from property not imported. He contends that the words mean that the money or value can arise in this country and need never have been brought into it at all.

Mr. Bucher argues that one should read into the words the condition that the money or value must itself have been imported. The words are not easy to construe.

Historically these two heads of charge originated in Mr. Pitt's Income Tax Act, 1799. They figure in that Act as:

"17th Case. *1st from foreign possessions.* The full amount "of the actual net income received in Great Britain . . ." (there follow directions as to periods of assessment).

"18th Case. *2nd Money arising from foreign securities.* The "annual income of such securities if the same were existing in "the preceding year to be estimated . . ." and so forth.

In the Income Tax Act, 1803, the Cases became Schedule D, Cases IV and V.

"4th Case. The duty to be charged in respect of interest "arising from securities in Ireland, or in the British plantations "in America, or in any other of His Majesty's Dominions out of "Great Britain, and foreign securities.

"The duty to be charged in respect thereof shall be computed "on a sum not less than the whole and just sum and sums (so "far as the same can be computed) which have been or will be "received in Great Britain, in the current year, without any "deduction or abatement.

"5th Case. The duty to be charged in respect of possessions "in Ireland, or in the British plantations in America, or in any "other of His Majesty's Dominions out of Great Britain, and "foreign possessions.

"The duty to be charged in respect thereof shall be computed "at not less than the full amount of the actual sums annually "received in Great Britain, either for remittances from thence "payable in Great Britain, or from property imported from "thence into Great Britain, or from money or value received in "Great Britain, and arising from property of any person or persons, which shall not have been imported into Great Britain, "computing the same on an average of the three preceding years, "as directed in the first case, without deduction or abatement."

The Income Tax Act, 1842, made no alterations material to the argument before us save that in that Act in Case V there appear for the first time the concluding words (namely (*d*)): "or "from money or value so received on credit or on account in "respect of such remittances property money or value brought "or to be brought into Great Britain."

The Income Tax Act, 1918, re-enacted words similar in material respects save that in rule 2 of Case V the words "from "thence" are omitted in two places (namely, in (*a*) and (*b*)).

If the matter were free from authority I should incline to the view that money or value under (*c*) need not be imported for the following reasons.

First, in the Act of 1803 the words in (*c*), namely, "arising "from property of any person or persons which shall not have "been imported," do not contain the words "from thence" after the word "arising," whereas (*a*) and (*b*) do contain the words "from thence." This seems to show that the legislature, while intending that in (*a*) and (*b*) importation should be connoted, did not so intend in (*c*).

Secondly, in the Act of 1803 and thereafter the use of the word "arising" is far more apt to indicate something whose origin was in this country than something brought into it. It is the antithesis, as it seems to me, of "imported" in this context.

Thirdly, having dealt under (*a*) with remittances and under (*b*) with property imported, it would be natural to go on to deal with the case of the person who did not have the proceeds from the sale of his crop of sugar in the plantations remitted to him here, and who did not import his crop of sugar and sell it here, but who sold it in this country to some purchaser who would dispose of it abroad or import it at some later date. He would thus be receiving income arising from property not imported. Receipt of the money in this country, not its importation into it, would be the test of (*c*). The tax would then have a coherent framework instead of having an obvious and illogical loophole.

Fourthly, if (*c*) only deals with money or value which has itself been imported, it adds nothing to (*a*) and (*b*), which cover money imported and property imported. Moreover, if the money or value referred to in (*c*) is only that which has been imported, there cannot be any relevance in considering whether it came from property not imported or any other income source.

Fifthly, the Act does not say that the money or value has to be imported. I do, however, appreciate that the words of (*d*) as a matter of construction definitely point in a contrary direction. But it is hard to believe that they were inserted in the Act of 1842 (and, thereafter, in the Act of 1918) with a view to altering the meaning of (*c*), so as to impose the connotation that the money or value must be imported and create the loophole to which I have referred. Had this been intended, it could have been clearly expressed in two or three words.

For the above reasons I do not myself see the need or justification for reading into (*c*) words which it does not contain. But opinions have been given obiter on the words of (*c*).

Viscount Cave L.C., after setting out the words of the rule, said in *Foulsham* v. *Pickles*[97]: "The word 'remittances' (which "recalls the expression 'remittances from thence' in the cor-"responding rule contained in the Act of 1842) clearly refers to "money remitted into the United Kingdom from outside. The "other branches of the rule all refer to property, money or value "imported or brought into the United Kingdom, and there are no "words in the rule which can comprise money arising and pay-"able here. If so, the inference is that money so arising and "payable is outside the rule, and so is not taxable under Case V "at all."

This view was expressed obiter and was not part of the ratio decidendi of the case, since rule 2 was held on other grounds clearly inappropriate to the facts which were there considered.

Lord Cohen, in *Inland Revenue Commissioners* v. *Gordon*,[98] said: "At one time Mr. Tucker, who appeared for the appellants, "suggested that it might be said that there were sums received "in the United Kingdom from 'money or value arising from "'property not imported,' but I think that he ultimately recog-"nised that it was impossible to bring this case within the third "source without grossly distorting the language used and, in "particular, without placing on the word 'from' a meaning "which it could not properly bear.

"There might have been another difficulty in Mr. Tucker's "way had he persisted in this argument. To succeed on it, it "would have been necessary for him to satisfy us that the "'money or value arising from property not imported' need not "itself be brought into the United Kingdom. It is plain from "the wording of the rule that sums cannot be said to be received "in the United Kingdom from the first, second or fourth sources "unless the source was itself payable in, imported into, or brought "or to be brought into the United Kingdom. It would be strange "if the sums received in the United Kingdom from the third "source were within the rule although the money or value was "not imported or to be imported into the United Kingdom. It "would be all the more strange since sums received in the United "Kingdom from the fourth source—i.e., 'money or value so "'received on credit or on account in respect of . . . *such* money "'or value' (i.e., the third source)—could not bring the rule into "operation unless *such* money or value had been brought or was "to be brought into the United Kingdom. I incline, therefore, to "the view that to succeed under the rule in respect of sums

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[97] [1925] A.C. 458, 464.

[98] 33 T.C. 226, 237.

" received from the third source the Crown must establish that " the money or value had been brought or was to be brought into " the United Kingdom." But, apparently, this particular point was not the subject of detailed argument.

Lord Normand said that he agreed with Lord Cohen's opinion " in omnibus," but Lord Morton of Henryton and Lord Tucker, while agreeing with Lord Cohen's opinion in other respects, expressly reserved the question whether the money or value arising from property not imported must itself be brought into the United Kingdom.

In view of the weighty sources from which those expressions of opinion (though obiter) emanate, I should not feel it proper to hold otherwise. But for the other reasons I have given I would be in favour of allowing the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Vandercom, Stanton & Co.*

E. D.

In re BIRMINGHAM, DECD.
SAVAGE AND ANOTHER *v.* STANNARD AND OTHERS.

1958
May 8, 9, 13.

Upjohn J.

Administration of Estates—Payment of debts—Property liable—Purchase money unpaid on house—Specific devise of house—Liability as between devisee and residuary legatees—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35 (1).[1]

Vendor and Purchaser—Lien of vendor—When charge arises—Contract to purchase dwelling-house—Death of purchaser before completion—Vendor's charge on estate for unpaid purchase money.

On March 31, 1953, a testatrix contracted to buy a freehold house and paid a deposit on the signing of the contract, but she died before completion of the purchase and before the date fixed for completion.

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[1] Administration of Estates Act, 1925, s. 35: " (1) Where a person " dies possessed of, or entitled to, or, " under a general power of appointment (including the statutory power " to dispose of entailed interests) by " his will disposes of, an interest in " property, which at the time of his " death is charged with the payment " of money, whether by way of legal " mortgage, equitable charge or " otherwise (including a lien for unpaid purchase money), and the " deceased has not by will deed or " other document signified a contrary " or other intention, the interest so " charged shall, as between the different persons claiming through the " deceased, be primarily liable for the " payment of the charge; and every " part of the said interest, according " to its value, shall bear a proportionate part of the charge on the whole " thereof."

By a codicil executed after the signing of the contract the testatrix devised the house free of all duties to her daughter, the first defendant, and, by her will dated September 8, 1952, had given her residuary estate to the second and third defendants. By arrangement between all parties the house was conveyed direct to the first defendant on May 21, 1953.

On a summons to determine how the balance of the purchase money should be borne as between the first defendant and the residuary legatees:—

Held, (1) that a vendor's lien for unpaid purchase money arose immediately upon the execution of the contract of sale; therefore, the vendor had a lien upon the house for the unpaid balance of the purchase money at the date of death of the testatrix.

Dictum of Sir George Jessel M.R. in *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499 applied.

Kettlewell v. *Watson* (1884) 26 Ch.D. 501 explained.

(2) That the specific gift of the house by the codicil did not indicate a "contrary or other intention" within section 35 (1) of the Administration of Estates Act, 1925,[1] and therefore the liability for the unpaid purchase money fell on the devisee.

(3) That the solicitors' charges in respect of the purchase must be borne by residue.

ADJOURNED SUMMONS.

By her will, dated September 8, 1952, the testatrix, Daisy Teresa Birmingham, gave the residue of her estate to the second and third defendants, St. Dunstan's and the Imperial Cancer Research Fund. By a first codicil dated January 2, 1953, she gave an immediate legacy of £10,000 to her daughter, the first defendant.

On March 31, 1953, the testatrix contracted to buy a freehold house, No. 9, Friar's Crescent, Brighton, for £3,500, and on the signing of the contract she paid to the vendor a deposit of £350. The property was sold subject to the Sussex Law Society's Conditions of Sale, which incorporated the Law Society's Conditions of Sale, 1934 and 1949,[2] except, so far as is relevant for the purposes of this report, clause 32 (4) and (5).

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[1] See note 1 on p. 523.

[2] Law Society's Conditions of Sale, 1934 and 1949, clause 32: "(1) If a purchaser shall fail to perform his part of the contract, the "vendor may give to the purchaser or "to his solicitor at least ten days' "notice in writing specifying the "default and requiring the purchaser "to make good the same before the "expiration of the notice.

"(2) If the purchaser does not "comply with the terms of the said "notice—(*a*) the deposit money, if "any, shall be forfeited to the "vendor, or in the case of settled "land, the Settled Land Act trustee; "(*b*) the vendor may resell the property without previously tendering a "conveyance to the purchaser; (*c*) "the contract shall, without prejudice to the vendor's right to resume

On March 27, 1953, her solicitor had written to the testatrix in the following terms: "With regard to the will, do you wish to "give the house [which the testatrix was about to buy] to [the "first defendant] in addition to the £10,000 already given to her? "If so, it will be necessary to make a codicil to this effect." The testatrix replied on April 10: "I would like [the first defendant] "to have the house . . . as well as the £10,000 already arranged."

The second codicil dated April 17, 1953, provided: "Whereas "I have entered into a contract for the purchase of No. 9, Friar's "Crescent, Brighton, . . . I hereby give the said property free of "all duties to my daughter . . ."

By clause 4 of the contract of sale, the purchase of the house was to have been completed on April 27, 1953, but the testatrix died on April 21. By arrangement between the parties the house was conveyed direct to the first defendant on May 21, 1953, the balance of the purchase money being paid by the executors. On July 15, probate was granted to the executors, the plaintiffs.

The executors, by originating summons, now asked the court to determine how the balance of the purchase money of the house. No. 9, Friar's Crescent, Brighton, should be borne as between residue and the specific devisee of the property.

Michael Browne for the plaintiffs.

Michael Bowles for the first defendant. Unless section 35 of the Administration of Estates Act, 1925, applies, the balance of the purchase money is payable out of the estate as an ordinary debt. For the purposes of section 35 the relevant date is the date of death, and thus it must be shown that at the death of the testatrix her interest in the property was subject to a lien for the balance of the purchase money. That was not so, because she died before the money was due, i.e., before the date fixed for completion. A vendor's lien enables a vendor to obtain his purchase money, after it has become due, by means of a sale by the court of the equitable interest in the property which passed to the purchaser on the signing of the contract. This right, however, is not exercisable until the purchase money becomes due, and, therefore, does not arise here. It is submitted that the general statement of Sir George Jessel M.R. in *Lysaght* v. *Edwards*[3] is too widely expressed. The true position appears

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"possession (if given up) and recover "documents belonging to him, become "void save and except that the "following provisions shall apply.

"(3) Any resale may be made by "auction or private contract at such "time subject to such conditions and "in such manner generally as the "vendor may think proper."

[3] (1876) 2 Ch.D. 499, 506.

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from *Kettlewell* v. *Watson*,[4] where Lindley L.J. says that the right arises when the time for completion has arrived and the purchase money is unpaid.

At the death of this testatrix the vendor had no lien but only the possibility of a lien. In fact no lien ever arose. It is conceded that, if property is mortgaged to secure money payable at a future date, it is charged with the payment of the money from the date of the execution of the mortgage; but a mortgage is the deliberate act of the parties, whereas a vendor's lien arises by implication of law. It is not exercisable and has no substance before the purchase money becomes due, and it would be wrong to treat it as in existence before then merely for the purpose of bringing section 35 into operation. There are several cases in which section 35 or its predecessor has been held to apply where a purchaser has died before completion, but in none of them, except *In re Wakefield*,[5] does it appear that the death was before the date fixed for completion. In *In re Wakefield*[5] the argument and judgments were directed solely to the question of contrary intention and the decision on this point was made sub silentio.

If a vendor's lien has to be considered, on principle, as arising on the signing of the contract, it can be excluded by agreement, and it is inferentially excluded in this case by clause 32 of the Law Society's Conditions of Sale, 1934 and 1949. Under that clause an unpaid vendor has a legal right to resell the whole legal and equitable interest as owner, and that supersedes and excludes any equitable remedy. In any case, it is submitted that a contrary intention is shown by the letter of April 10, 1953, or, alternatively, by the second codicil. For this purpose it is not necessary to refer to the section; any clear indication of a contrary intention is enough: *In re Campbell*.[6] The testatrix, in telling her solicitor that she wants her daughter to have the house, shows an intention that if she dies after completion the daughter is to have it; and equally so if she dies before completion. That is reinforced by the gift of the house free of duty in the second codicil, which shows an intention to give the house free of all other charges: *In re King*.[7] It seems clear that the testatrix did not intend her daughter to take merely the benefit of the deposit free of the duty, if any, attributable to that.

The costs of purchase are payable out of the estate. At the death of the testatrix her solicitors had no lien on anything, and any lien they might have had would have been a possessory lien, not creating any equitable charge.

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[4] (1884) 26 Ch.D. 501, 507.

[5] [1943] W.N. 169; [1943] 2 All E.R. 29.

[6] [1893] 2 Ch. 206, 215.

[7] [1942] Ch. 413; [1942] 2 All E.R. 182.

E. I. Goulding for the second and third defendants. In this case section 35 of the Administration of Estates Act, 1925, applies. That section operates to charge the property with the unpaid balance of the purchase money at the date of the death of the testatrix. There is nothing here to oust the operation of that section and there is no contrary intention expressed in either the second codicil or the letter of the testatrix to her solicitors dated April 10.

Apart from statute, the position as between vendor and purchaser after the execution of a contract of sale is set out by Sir George Jessel M.R. in *Lysaght* v. *Edwards*.[8] A vendor's lien for the unpaid balance of purchase money arises the moment the contract is signed. The vendor may not be able to enforce his lien by action until the date fixed for completion, but in general he will have the right to remain in possession of the property and refuse to execute a conveyance until the purchase money be paid. After the date fixed for completion he can enforce his lien by action.

UPJOHN J. stated the facts and continued: The first question that arises is how the balance of the purchase money, which was paid to the vendor by the executors out of residue when the conveyance was executed, ought to be borne. The arrangement was made without prejudice to all questions and for convenience. Upon that three points have been argued before me. It is argued on the one side that section 35 of the Administration of Estates Act, 1925, applies to this case, and it is said that that section operates to charge the property at the date of the death of the testatrix (which, admittedly, is the relevant date), with the unpaid balance of purchase money, and it is submitted there is nothing to prevent the operation of that section. [His Lordship read section 35 (1) of the Act, and continued:] Mr. Bowles, for the first defendant, submits, for the reasons that I shall mention in a moment, that section 35 has no operation in the circumstances of this case, and that if it has, the testatrix has, in fact, by will or other document signified a contrary or other intention. He further submits that clause 32 of the Law Society's Conditions of Sale, 1934 and 1949, prevents any lien or charge arising in this case. Sub-clauses (1) (2) and (3) of clause 32 do apply to this sale (although sub-clauses (4) and (5) do not), and that gives a vendor certain rights if a purchaser fails to fulfil his part of the contract. The vendor may give a notice, and if he does give a notice and it is not complied with, then certain remedies are available to him. Those remedies are set out in sub-clause (2). It is said that that ousts the equitable lien which, at any rate, after the date fixed for completion, would arise under the operation of the general law. I am quite unable to accept that argument. The remedies provided by clause 32 are, in my judgment, additional to and not in any way in derogation of the vendor's general rights according to law. If he chooses to avail himself of the particular remedy of clause 32, different consequences may flow; but until he does exercise that right, I can see nothing in the terms of the contract which prevents the ordinary vendor's lien for unpaid purchase money arising.

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[8] 2 Ch.D. 499, 506.

I return then to the main point. It is submitted by Mr. Bowles that, as the date of the death of the testatrix was before the date fixed for completion, the vendor had no lien upon the estate for the balance of the unpaid purchase money. A vendor's lien, he says, only arises at the date fixed for completion. He submits that the executors, in paying the balance of the purchase money shortly after the date of the testatrix's death, were not discharging a charge in any way but were performing a contract. He relies principally upon *Kettlewell* v. *Watson*,[1] in which it is important to notice that certain vendors who had allowed purchase money to remain unpaid after actual conveyance, and apparently after certain sub-conveyances, were seeking to enforce against the sub-purchasers the vendor's lien for unpaid purchase money. Lindley L.J. said this[2]: "The prima facie right of an unpaid vendor of "land to an equitable lien upon it for the amount of his unpaid "purchase money is too well established to be disputed. The "right arises whenever there is a valid contract of sale and the "time for completing that contract has arrived and the purchase "money is not duly paid." Those last words are important.

On the other side, Mr. Goulding, for the charities interested in residue, relies upon the well-known passage in *Lysaght* v. *Edwards*.[3] Sir George Jessel M.R. lays down the general law as between vendor and purchaser pending completion in these terms[4]: "It appears to me that the effect of a contract for sale "has been settled for more than two centuries; certainly it was "completely settled before the time of Lord Hardwicke, who

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[1] (1884) 26 Ch.D. 501.

[2] Ibid. 507.

[3] (1876) 2 Ch.D. 499.

[4] Ibid. 506.

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"speaks of the settled doctrine of the court as to it. What is that "doctrine? It is that the moment you have a valid contract for "sale the vendor becomes in equity a trustee for the purchaser "of the estate sold, and the beneficial ownership passes to the "purchaser, the vendor having a right to the purchase money, a "charge or lien on the estate for the security of that purchase "money, and a right to retain possession of the estate until the "purchase money is paid, in the absence of express contract as "to the time of delivering possession. In other words, the "position of the vendor is something between what has been "called a naked or bare trustee, or a mere trustee (that is, a "person without beneficial interest), and a mortgagee who is not, "in equity (any more than a vendor), the owner of the estate, but "is, in certain events, entitled to what the unpaid vendor is, "videlicet, possession of the estate and a charge upon the estate "for his purchase money."

Mr. Goulding submits that the vendor's charge for the purchase money arises the moment that the contract is signed. The remedies available to enforce that charge may vary according to the state of the transaction, that is to say, until the date fixed for completion, the vendor cannot actively enforce his lien by action, but he has the right (subject always, of course, to the express terms of the contract) to remain in possession and to refuse to execute a conveyance until the purchase money is paid. After the date fixed for completion, then he has a right to enforce the charge or lien by appropriate proceedings in these courts. But Mr. Goulding submits that the statement of Sir George Jessel shows that throughout, from the moment the contract was executed, the vendor has a charge for his unpaid purchase money. I think that that argument is quite correct. It seems to me that the explanation of *Kettlewell* v. *Watson*[5] is this: that the observations of Lindley L.J., which I have read, were perfectly accurate in the circumstances of that case, where unpaid vendors were seeking to enforce their remedy against sub-purchasers in respect of unpaid purchase money, and, of course, that remedy, as I have already stated, only arises after the date fixed for completion.

I am fortified in the view I have expressed by the fact that in *In re Wakefield*[6] the facts, so far as relevant to this point, were entirely indistinguishable, because the contract was signed, the date for completion was to be August 12, 1941, but the testator died on August 3. The point taken before me was, however, never taken by counsel, and was never noticed by Lord Greene M.R. or by Luxmoore L.J. I hardly think the point, had it been a valid one, could have escaped their attention. Accordingly, in my judgment, section 35 does apply unless the contrary intention is shown, because the charge for the unpaid balance of the purchase money arose upon execution of the contract.

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[5] 26 Ch.D. 501.

[6] [1943] W.N. 169; [1943] 2 All E.R. 29.

Then the question arises whether a contrary intention for the purposes of the section is shown. It was submitted, first, that the terms of the second codicil itself showed that the testatrix intended that the balance of the purchase money was to be discharged out of residue. Secondly, reliance was placed upon the two letters passing between the testatrix and her solicitor. I do not think there is really any difference between the two. At first sight it seemed to me that the testatrix had expressed or had signified a contrary intention, because it seemed illusory to make a codicil giving the property to her daughter if, indeed, all she was giving was the property subject to payment of the unpaid purchase price, especially as she apparently considered that the gift would be substantial, for she directed that it was to be free of all duties. But having heard full argument I am unable to come to that conclusion. She gives the property which she has contracted to purchase. That is undoubtedly the property referred to in the contract she had just signed, but it says nothing, either expressly or by implication, as to the incidence of section 35, and I see nothing which can exclude the operation of that section. Let me take an example. Suppose that in fact the contract had been completed in the lifetime of the testatrix, but that (solely for the sake of argument) the testatrix had borrowed on mortgage, say, £3,000 to enable her to complete the purchase, how would the codicil have operated then? I do not think it could have been argued successfully that by the terms of the codicil, or by the terms of her letters to her solicitors, she was signifying a contrary intention for the purposes of section 35. In such a case it seems to me clear that the daughter would have taken the property subject to the mortgage which the testatrix had entered into. So if the law implies a charge upon the property for unpaid purchase money, the daughter, in my judgment, takes subject to it, because the testatrix has not signified a contrary intention.

Accordingly, it seems to me that the unpaid purchase money is charged upon the property, and it having been paid out of residue without prejudice to all questions, the necessary adjustment must be made in paying the legacy of £10,000 to the daughter.

Two subsidiary questions arise. The first is as to stamp duty of £70 upon the purchase. That, in fact, has been paid out of residue, but there seems to be some dispute as to the terms upon which it was paid, and as unhappily the parties appear to be at arm's length in this case, that matter must stand over and be referred back to chambers for further evidence to be filed as to the precise terms upon which the stamp duty was discharged out of residue. I do hope that the parties will be able to compromise their differences over this somewhat trivial sum.

The last matter is with regard to the solicitors' costs incurred in completing the purchase. The scale fee seems to have been some £56, added to which there are certain search fees and petty disbursements, and so on. Of course, residue can only establish a case for throwing those costs upon the property if they can show that those costs were in some way equitably charged upon the property. No doubt had the conveyance been completed in the lifetime of the testatrix, the solicitors would have received the deeds in the normal course, and would have had an equitable lien on those deeds for any costs remaining unpaid; but what was the position at the relevant time, that is, the date of the testatrix's death? They were then doing work. No bill of costs had been rendered. Nothing at that time was due from the testatrix to her solicitors. Furthermore, they could have no lien on anything, for they had no deeds in their possession. It was somehow suggested they had some form of lien upon the contract. I do not follow that. It was their duty to carry through the contract to completion. I cannot see that at the relevant date this inchoate claim to costs was charged upon anything. Accordingly, those costs must be borne by residue.

Declaration accordingly.

Solicitors: *Ridsdale & Son for Somerville, Hilton & Savage, Torquay; Ranger, Burton & Frost; Wilde, Sapte & Co.*

P. P.

In re No. 1, ALBEMARLE ST.

[1957 T. No. 1289.]

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Dec. 11, 12, 15.

Upjohn J.

Landlord and Tenant—Business premises (Security of tenure)—Terms of new tenancy—Collateral term—Right to display advertising signs under existing tenancy—Whether term of tenancy—Whether right to be included in new lease—Jurisdiction of court—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 35.

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No. 1, Albemarle St., *In re.*

Business premises in a building in Albemarle Street, Piccadilly, were let to the applicants for a term of 21 years by a lease expiring on December 25, 1957.

By clause 7 of the lease the lessors authorised and permitted the lessees to maintain during the continuance of the lease "the "advertising signs . . . in their present position facing Picca- "dilly and Albemarle Street outside the building of which the "demised premises form part . . ." On the outside of the building there were, and had been since before the lease came into being, four signs advertising a product of the applicants.

On an application for a new tenancy under section 24 of the Landlord and Tenant Act, 1954, the respondents did not challenge the applicants' right to a new tenancy but objected to the continuance of the advertising signs and contended that the court had no jurisdiction to include a clause such as clause 7 in a new lease ordered to be granted under section 29 of the Act; alternatively, that if there were such jurisdiction, it was not a case in which it should be exercised:—

Held, that although the right to exhibit signs set out in clause 7 of the current lease was not a term which touched or concerned the land demised but was a mere licence, there was nevertheless jurisdiction under section 35[1] of the Landlord and Tenant Act, 1954, which gave the court the widest possible discretion and entitled it to look at all the terms of the current tenancy agreement and all the relevant circumstances, to make an order for a new lease including such a right.

Held, further, on the facts, that it was a case in which the court should exercise its discretion in favour of the applicants, and, accordingly, the new lease ordered to be granted should contain a clause in the same terms as clause 7.

ADJOURNED SUMMONS.

The applicants, the Triplex Safety Glass Company Ltd., lessees of business premises consisting of the second floor of No. 1, Albemarle Street, Piccadilly, London, W.1, applied to the court by originating summons under section 24 of the Landlord and Tenant Act, 1954, for an order for the grant by the respondents, Volito Managements Ltd., of a new tenancy of the premises for a period of 14 years from the termination of the current tenancy at a rent of £4,500 per annum, and upon the same terms as the current tenancy, or, alternatively, for such period and for such rent and upon such terms as the court might determine.

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[1] Landlord and Tenant Act, 1954, s. 35: "The terms of a tenancy "granted by order of the court . . . "(other than terms as to the duration "thereof and as to the rent payable "thereunder) . . . in default of . . . "agreement, may be determined by "the court; and in determining those "terms the court shall have regard to "the terms of the current tenancy "and to all relevant circumstances."

The following facts are taken from the judgment of Upjohn J.: The lease, dated March 25, 1937, was a demise of the second floor of No. 1, Albemarle Street, Piccadilly, in the County of London, for a term of 21 years expiring on December 25, 1957, at an inclusive rent of £2,270 plus certain charges for cleaning, heating and lighting services. That lease was continued under the provisions of section 24 of the Landlord and Tenant Act, 1954, but in fact the respondents gave a notice under the Act, terminating the lease on December 25, 1957. The original lessors were the District Bank, Limited, and a Mr. Herbert Roper Barrett, but the freehold reversion was now vested in the second respondent, one Slazenger, who had granted a lease of the whole of No. 1, Albemarle Street, to the first respondents, Volito Managements Ltd., for a term expiring on December 25, 1970. The premises leased to the applicants did not contain showrooms or anything of that sort; they were used solely as the head office, and in fact the applicants had been in occupation of the premises since the time of their incorporation in 1912.

The respondents did not challenge the right of the applicants to a new tenancy under the terms of the Landlord and Tenant Act, 1954, but there was a dispute as to what the terms of the new tenancy should be. There were four matters in dispute: first, duration of the new lease; secondly, the proper rent to be paid under the new lease; thirdly, a question as to the rights of access to the demised premises; and, fourthly, whether the applicants should be entitled to exhibit certain signs outside the building advertising "Triplex Safety Glass" as a term of the new lease. Under the terms of the existing lease the applicants were entitled to exhibit on the premises certain signs advertising "Triplex Safety Glass," and clause 7 provided: "The lessors hereby authorise and permit the lessees "to maintain during the continuance of this lease the advertising signs or such other signs as shall be approved by the "lessors' surveyors in their present position facing Piccadilly "and Albemarle Street outside the building of which the "demised premises form part subject to the provisions as "follows. . . ." There were four signs in all.

There were three signs on the outside of the building between the ground and first floors; one in Albemarle St. saying: "Triplex Safety Glass"; a second on the corner of the building saying: "Fit Triplex and Be Safe"; and a third sign facing Piccadilly saying: "Triplex Safety Glass." The fourth sign

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was between the fourth and fifth floors and said: "Safety Triplex "Glass." The second and fourth signs were illuminated.

The respondents objected to the continued exhibition of the signs on the grounds that there was no jurisdiction to include a clause such as clause 7 in a lease ordered to be granted under section 29 of the Act; alternatively, that if there were jurisdiction so to include it, it should not be exercised.

R. E. Megarry Q.C. and *R. W. Vick* for the landlords. The Landlord and Tenant Act, 1954, does not give the court jurisdiction to include a clause such as clause 7 of the lease in a new lease ordered under section 29 of the Act. The right to display the advertising signs is an entirely independent right and cannot be regarded as part of the demised premises or part of the holding. In construing section 35 of the Act the court should have regard only to the terms of the tenancy and not to all the terms contained in the lease. In contrast to the Act of 1954, the Rent Restriction Acts refer to all the terms contained in the tenancy agreement. Under section 35 the court should have regard only to the terms which can be properly described as the terms of the tenancy by demise and should not include any terms which cannot properly be described as relating to the property demised. To determine what terms should be included, one test might be that the terms be taken to be analogous to the easements and quasi-easements contained in section 62 of the Law of Property Act, 1925. Another test might be that one should have regard only to the terms which can properly be described as touching or concerning the land demised and which would run with an assignment of the lease or the reversion. The rights contained in clause 7 of the lease would not so pass upon an assignment: see *Thomas* v. *Hayward* [2] and *Dewar* v. *Goodman*.[3] They are not rights which touch or concern the land demised. Clause 7 is merely a licence to exhibit advertising signs on the property and has no connection with the land demised which is relevant for the present purpose.

The definition of "tenancy" in section 69 (1) makes it plain that the "tenancy" referred to in sections 32 (3) and 35 is the estate created by the lease or tenancy agreement and so is distinct from the document creating it. It is not enough merely to show that the advertisement provisions are contained in the lease; the lease creates two distinct rights, namely, a tenancy and a licence to display the signs, and so the licence cannot be regarded as one of the terms of tenancy. Accordingly, the court has no power, either under section 32 (3) or under section 35, to include it in any new tenancy. In any case it is section 32 that governs the rights to be included in the tenancy, and section 35, which merely deals with the terms on which those rights are to be enjoyed, cannot be used to include additional rights, whether they be rights to advertise or, for example, an option to purchase the freehold.

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[2] (1869) L.R. 4 Ex. 311.

[3] [1908] 1 K.B. 94; [1909] A.C. 72.

Sir Lionel Heald Q.C. and *J. T. Plume* for the tenants. Mr. Megarry's approach to this matter is erroneous; his submission on the narrow construction to be given to the word " terms " and the phrase " terms of the current tenancy " would seriously limit the benefit given to tenants by the Act. For 20 years the tenants have been paying a very substantial rent and one of the chief benefits to them has been the right to use these signs. Section 32 (3) was included in the Act for the very purpose of preventing parties from putting forward narrow arguments which might deprive tenants of something of great value to them. The tenants rely on section 35 and submit that the word " term " should be given its widest possible meaning, and that this right to display the signs is a term of their tenancy. According to the ordinary use of English language it would be reasonable to describe the right as a term or condition of this agreement. There is no case in which any special meaning has been given to the word " term." The only way to ascertain the " terms " of the tenancy is to look at the lease. A tenancy is not a document but an abstraction of the benefit conferred by an agreement. This right to exhibit the signs is a right enjoyed by the tenants under section 32 (3), and as such should be included in the new tenancy. It is a legal right, legally enforceable (*Henry Ltd.* v. *M'Glade* [4]), and it is an essential factor in the enjoyment of the premises by the tenants.

The words " terms of the tenancy " should be read as widely as the policy of the Act requires. [Reference was made to *Stumbles* v. *Whitley*,[5] *Engvall* v. *Ideal Flats Ltd.*[6] and *Henry Ltd.* v. *M'Glade*.[7]] It may be that there are two categories of rights—absolute rights and qualified rights—to be granted in the discretion of the court. Here there is no absolute right to the continued exhibition of the signs; the question is entirely one of discretion for the court.

Megarry Q.C. in reply on the cases. *Henry Ltd.* v. *M'Glade* [7] is distinguishable. It serves to point the contrast with the present case. In this case clause 7 is not included in a " parcels " clause and none of the rights of the tenancy applies to it. In *Engvall* v. *Ideal Flats Ltd.*[8] the tenant's right to hot water in demised premises was included in the statutory tenancy because it was a term of the original contract of tenancy. In the present case the right to display the signs is quite divorced from what was demised, and if it is to be made part of the tenancy it will mean redrafting the lease. If the case is covered by section 32 (3), there is no question of discretion. The clause has got to go in the new lease.

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[4] [1926] N.I. 144.

[5] [1930] 1 K.B. 393; 46 T.L.R. 37, 555.

[6] [1945] K.B. 205; [1945] 1 All E.R. 230.

[7] [1926] N.I. 144.

As to *Stumbles* v. *Whitley*,[9] the basis of the Act of 1927 on which that case was decided is wholly different from the Act of 1954. In the former, one got a new lease of the whole premises even if one carried on a business only in a part of them. The present Act is less generous to the tenant in what it gives: see section 23 (3) of the Landlord and Tenant Act, 1954.

UPJOHN J. stated the facts, and having held that 14 years was a reasonable term for the new lease, that the rent should be fixed at £5,500 per annum, and that the hours of access to the demised premises should be the same as under the existing lease, continued: Now I come to the most important matter, the question of signs. The terms in the lease dealing with the exhibition of signs are to be found in clause 7. It has been rightly pointed out that that clause comes after the ordinary clauses that one expects to find in a lease, and after the proviso for re-entry. It comes directly after a clause entitling the lessees to break, and is in these terms: " The lessors hereby authorise " and permit the lessees to maintain during the continuance of " this lease the advertising signs or such other signs as shall be " approved by the lessors' surveyors in their present position " facing Piccadilly and Albemarle Street outside the building of " which the demised premises form part subject to the provisions " as follows "; then there are certain provisions which I do not think are material. It is plain that these signs had been there before this lease came into being, but no one can remember for how long they had been there. There is one other clause in connection with this matter which I must read, and that is clause 2, sub-clause (10), a covenant by the lessees " not to affix " upon the external walls or otherwise on the outside or staircase

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[8] [1945] K.B. 205.

[9] [1930] 1 K.B. 393.

"or corridors of the demised premises any name sign or placard "except of such dimensions and in such manner and place or "places (if any) as the lessors shall in writing sanction." Whence it follows that without the lessors' sanction the lessees are not entitled to exhibit any signs upon or outside the premises demised to them on the second floor. It is perhaps worthy of note that the lessors are defined as including their successors and assigns where the context so admits, and the expression "the lessees" includes their successors and permitted assigns where the context so admits. I have one further general observation. It seems to me that these signs are purely advertising signs and do not in any way indicate that the applicants in fact have a head office within No. 1, Albemarle Street.

Objection to the continued exhibition of these signs is taken by the respondents on two grounds: first, that there is no jurisdiction to include a clause such as clause 7 in a lease ordered under section 29 of the Landlord and Tenant Act, 1954; secondly, they submit that if there is such a jurisdiction, then it ought not to be exercised in this case. This question of jurisdiction raises an interesting and difficult point, and some reference to the sections of the Act now becomes necessary. The first one I need refer to is section 23 (1), which provides: "Subject to the "provisions of this Act, this Part of this Act applies to any "tenancy where the property comprised in the tenancy is or "includes premises which are occupied by the tenant and are so "occupied for the purposes of a business carried on by him or for "those and other purposes. . . . (3) In the following provisions "of this Part of this Act the expression 'the holding,' in relation "to a tenancy to which this Part of this Act applies, means the "property comprised in the tenancy, there being excluded any "part thereof which is occupied neither by the tenant nor by a "person employed by the tenant and so employed for the "purposes of a business by reason of which the tenancy is one "to which this Part of this Act applies."

Section 24 provides for the continuation of tenancies on their termination by the landlord or at the request of the tenant for a new tenancy. Section 29 (1) is in these terms: "Subject to "the provisions of this Act, on an application under subsection "(1) of section twenty-four of this Act for a new tenancy the "court shall make an order for the grant of a tenancy comprising "such property, at such rent and on such other terms, as are "hereinafter provided."

Section 32 contains one important and relevant provision.

Subsection (1) provides: " Subject to the next following sub-" section, an order under section twenty-nine of this Act for the " grant of a new tenancy shall be an order for the grant of a new " tenancy of the holding; and in the absence of agreement " between the landlord and the tenant as to the property which " constitutes the holding the court shall in the order designate " that property by reference to the circumstances existing at the " date of the order." By subsection (3): " Where the current " tenancy includes rights enjoyed by the tenant in connection " with the holding, those rights shall be included in a tenancy " ordered to be granted under section twenty-nine of this Act." The applicants, of course, rely upon that subsection. [His Lordship read section 33 [1] and continued:] Section 35, which is the other section upon which the applicants rely, provides: " The " terms of a tenancy granted by order of the court under this " Part of this Act (other than terms as to the duration thereof " and as to the rent payable thereunder) shall be such as may " be agreed between the landlord and the tenant or as, in default " of such agreement, may be determined by the court; and in " determining those terms the court shall have regard to the " terms of the current tenancy and to all relevant circumstances."

In section 69 (1) " Tenancy " is defined in this way: " ' tenancy ' means a tenancy created either immediately or " derivatively out of the freehold, whether by a lease or under-" lease, by an agreement for a lease or underlease or by a tenancy " agreement or in pursuance of any enactment (including this " Act), but does not include a mortgage term or any interest " arising in favour of a mortgagor by his attorning tenant to his " mortgagee, and references to the granting of a tenancy and to " demised property shall be construed accordingly." Then the section provides that " ' terms,' in relation to a tenancy, includes " conditions."

Dealing first with section 35, Sir Lionel Heald, for the applicants, invites me to give the widest possible meaning to the word " terms," wherever it is found in that section, and to the phrase " terms of the current tenancy." He referred me to authorities on the earlier Landlord and Tenant Act, 1927, and on the Rent Restriction Acts. I do not, however, refer to them in detail, for it is, after all, a question of construction of the Act in each case. Certainly it is true to say that those authorities do favour a wide construction. Mr. Megarry, on the other hand, invites me to take a narrower view of these words and phrases. One thing must be clear in the circumstances of this case. Clause 7 of the original lease creates a licence to exhibit these signs and no more. It cannot possibly be said that this right to exhibit signs can be described as part of the demised premises or as part of the holding, for these signs are not part of the holding; they are not contiguous to the holding or anything of that sort. Mr. Megarry submits that in construing section 35 I ought to have regard only to the terms of the tenancy. He points out that in contrast, indeed, to the Rent Restriction Acts, the reference is to the tenancy and not to all the terms contained in the tenancy agreement. He, therefore, says that under section 35 the only terms to which the court ought to have regard are those terms which are properly described as the terms of a tenancy by demise, and ought not to include any terms which cannot properly be described as relating to the demised property. He suggests two tests by way of analogy: first, that the terms might be taken to be analogous to the easements and quasi-easements which are to be found set out in section 62 of the Law of Property Act, 1925; secondly, he suggests, as another test to discover what terms are relevant, that one should have regard only to the terms which can properly be described as touching or concerning the land demised, and which, therefore, would run with an assignment of the lease, or with an assignment of the reversion, upon any assignment. He refers me to two cases: *Thomas* v. *Hayward*[2] and *Dewar* v. *Goodman*,[3] approved in the House of Lords.[4] He submits, and I accept his submission, that judged by the tests laid down in those cases, the rights contained in clause 7 would not pass on an assignment of the lease. It is possible they might pass by express assignment, but that, of course, would require the consent of the landlords. But he submits, and I agree with him, that the rights set out in clause 7 are not terms which touch or concern the land demised. It is a pure licence to exhibit certain signs on property which has no relevant connection with the actual property demised.

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[1] Landlord and Tenant Act, 1954, s. 33: " Where on an application " under this Part of this Act the " court makes an order for the " grant of a new tenancy, the new " tenancy shall be such tenancy as " may be agreed between the land-" lord and the tenant, or, in default " of such an agreement, shall be such " a tenancy as may be determined by " the court to be reasonable in all the " circumstances, being, if it is a " tenancy for a term of years certain, " a tenancy for a term not exceeding " fourteen years . . ."

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[2] (1869) L.R. 4 Ex. 311.

[3] [1908] 1 K.B. 94.

[4] [1909] A.C. 72.

However, it is, as I have said, a question of construction of the Act, and first I want to say a few words about section 32 (3). It is clear there that the rights enjoyed by the tenant in connection with the holding must be included in any tenancy granted under section 29. Section 32, unlike section 35, gives the court no discretion in the matter. In my judgment, although it is not necessary to come to a final conclusion on the matter, it seems to me that section 32 is dealing with terms connected with the holding. Whether it be right to confine those terms to terms which touch and concern the land demised or not I need not say, but that is the type of right which is being dealt with in section 32. When one comes to section 35, which deals, as the side-note says, with other terms of the tenancy, it is a question of judicial discretion. That section goes much further than section 32. I do not believe that when section 35 was framed Parliament was contemplating that there should be an elaborate dissection of the terms contained in the tenancy as between those which touch and concern the demised premises and those which do not. I think that Parliament intended to give a very wide discretion to the court, and that the court is entitled to look to all the terms contained in the current tenancy agreement. Further than that, the great width of section 35 is shown by the fact that the court is entitled, and, indeed, must have regard, not only to the terms of the current tenancy but to all relevant circumstances. It seems to me, therefore, that Parliament intended to confer upon the court the widest possible discretion.

I have come to the conclusion, as I have said, that I have the widest possible discretion in looking at all the terms of the current tenancy agreement and in considering all relevant circumstances, and it seems to me, therefore, that I have jurisdiction to make an order for a new lease which contains some clause on the lines of clause 7. But the question is whether I should in fact exercise that discretion. We start with this, that this is in fact a clause which has no real connection with the demised property; it is purely personal and it is merely a licence. Nevertheless, the applicants have had it and have exercised that right for at least 21 years, and it may be much longer. They do, in fact, attach a very great importance to it, and that, I think, is perfectly natural. It may be that if they do not get that right, they will not accept the new tenancy. That, of course, is a matter for them. Objection on the merits, however, is taken by the respondents. Their manager, in his affidavit, stated that it was desirable to preserve and maintain the prestige value and high-quality nature of the building. He went on: "It is within my personal "knowledge that it is the policy of the lessors not to permit "the affixing and maintenance on the outside of the buildings of "which the demised premises form a part of signs of the nature "of the sign exhibited by the lessees, which is a lighted advertisement sign [that is not accurate]. In the opinion of the lessor "and myself this or any advertising sign is out of keeping with "the use of the said building for the purposes mentioned in "paragraph 7 hereof and detrimental to the structure and "appearance of the said building."

At that stage, I pointed out that I travelled along Piccadilly most mornings from the vantage point of the upper deck of a No. 9 omnibus, and I asked whether the parties desired me to close my eyes to that fact, or whether I might take into account my own knowledge of the locus in quo, and I was in fact invited by both parties to take that into account. During the course of the hearing I made a careful inspection from Hamilton Place to Piccadilly Circus, and the idea that these signs are out of keeping seems to me, with all respect to the deponent, complete nonsense. There are signs almost by the hundred of that sort, and no detriment is suffered in that part of London if a building has a sign upon it. For many years, as we see from the Triplex Report for 1957, this building had yet another sign on it, "Car and General "Insurance," and when they left, that sign left with them. Mr. Megarry did not press this point. However, when the respondents' manager went into the witness-box, he was asked certain questions in chief and he put it in quite a different way. He said that in his experience of lettings to other tenants, they objected to paying the same rent as the one tenant who was entitled to have this big sign, although he was only occupying one-fifth of the premises, that they were trying to get tenants only of the highest standing, and that the presence of the signs had an effect on the tenants of the highest class, who disliked signs of any type. Curiously enough, that general statement was not supported by a single example of any kind. The witness has had a good deal of experience of letting No. 1, Albemarle Street, but he never told me of a single case where an intending tenant objected to paying a very high rent on the ground that there was a sign advertising Triplex glass outside. I shall not mention names because matters are still in negotiation, but it appears that negotiations are now going on, and a friendly foreign Power is endeavouring to acquire the ground floor, and indeed the first floor, and appears, if the respondents' manager's method of working it out is correct, to be prepared to pay a very high sum for the first floor. But there is no suggestion that they are the less willing because between the first and ground floor there is a large sign advertising Triplex Safety Glass. Further, a curious feature of the case is that none of the applicants' witnesses were cross-examined upon this matter at all, and the witness Rose, although called for the respondents as their expert, never dealt with it in his report or in his affidavit. He was asked some questions about it in chief, and he gallantly did his best to support the idea, but he did so obviously without conviction. There is one further circumstance, and that is that in 1956 the respondents' manager had a conversation with the estate agent then acting for the applicants. I have no doubt that the manager said that they did not want to continue the lease with regard to the signs, that they did not in fact want to have any more signs. I accept that. But he suggested that they might pay £7,200 per year for 19 years, and £2,500 a year for the signs. He said he suggested that figure as a joke, merely to choke them off, but be that as it may, that offer was made and apparently accepted seriously by the agent, who communicated it to his principals.

Taking all these matters into consideration, I am quite satisfied on the evidence that the continued existence of these signs on this building, where they have been for 21 years at least, has no adverse effect on the letting of the property. I do not for one moment accept that intending tenants are prepared only to pay lower rents; indeed an exhibit before me shows that they are, and have been, most willing to pay extremely high rents. I do not accept that, by reason of these advertisements, the highest class of tenant is turned away from trying to obtain a tenancy in this desirable building. The evidence is all the other way. Therefore, notwithstanding that this is a purely personal right, it does not seem to me that its continued existence does the slightest possible harm to the respondents, and I propose to exercise my jurisdiction to grant that right during the currency of the lease which I shall order. That being so, there is no real dispute before me as to the proper rent for that right. I have had evidence from two experts, one on each side, and they substantially agree. I shall assess the rent for this right at £300 per annum.

In those circumstances it is unnecessary for me to consider whether the applicants would have established a case under section 32 (3); I have already said enough to indicate that, in my judgment, that is a very different section from section 35.

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No. 1, ALBEMARLE ST., *In re.*

Upjohn J.

Therefore the order that I propose to make is this: with regard to the main lease, it will be for a period of 14 years with no option to break, at a rent of £5,500. The lease will be on the same terms as at present with the change in rent and the change in the term, that is to say, it will not vary the present terms as to access, and it will contain clause 7.

Order accordingly.

Solicitors: *Bird & Bird; Stuart Hunt & Co.*

P. P.

C. A.

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March 16, 17, 18, 19; *April* 27.

Lord Evershed M.R., Romer and Pearce L.JJ.

FAWCETT PROPERTIES LTD. *v.* BUCKINGHAM COUNTY COUNCIL.

[1958 F. 82.]

Town and Country Planning — Development — Planning permission — Condition—Relation of conditions to local planning considerations —Whether condition void for uncertainty—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 36.

By-law—Validity—Uncertainty—Condition of planning permission—Whether analogous to by-law—Town and Country Planning Act, 1947, *ss.* 14 (1), 36.

Statute—Construction—Uncertainty—Whether provision void—Provision incorporated in condition of planning permission—Whether condition valid—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 115 (2).

Housing—" Agricultural population "—Meaning—Housing Act, 1936, *s.* 115 (2).

On December 5, 1952, the Buckingham County Council, acting under sections 14 and 36 of the Town and Country Planning Act, 1947,[1] granted to the plaintiffs' predecessor in title permission to develop an area at Chalfont St. Giles by building thereon a pair

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[1] Town and Country Planning Act, 1947, s. 14: " (1) Subject to the " provisions of this and the next " following section, where application " is made to the local planning " authority for permission to develop " land, that authority may grant per- " mission either unconditionally or " subject to such conditions as they " think fit, or may refuse permission; " and in dealing with any such " application the local planning " authority shall have regard to the " provisions of the development plan, " so far as material thereto, and to " any other material considerations. " (2) Without prejudice to the gener- " ality of the foregoing subsection, " conditions may be imposed on the " grant of permission to develop land " thereunder—(*a*) for regulating the " development or use of any land " under the control of the applicant " (whether or not it is land in respect " of which the application was made) " or requiring the carrying out of

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Fawcett Properties Ltd. v. Buckingham County Council.

of semi-detached cottages subject to a condition that: "The "occupation of the houses shall be limited to persons whose "employment or latest employment is or was employment in agri-"culture as defined by section 119 (1) of the Town and Country "Planning Act, 1947, or in forestry, or in an industry mainly "dependent upon agriculture and including also the dependants "of such persons as aforesaid." The document added: "The "reasons for imposing the said conditions are because the council "would not be prepared to permit the erection of dwelling-houses "on this site unconnected with the use of the adjoining land for "agriculture or similar purposes." The approval was registered as a local land charge. The property was within the metropolitan green belt, but there was no development plan yet in operation, although one was being prepared.

At first the cottages were occupied by persons whose employment was covered by the terms of the condition, but the plaintiffs, who acquired the freehold in 1956, wished to put in occupation persons whose employment was not so covered. They, therefore, sought a declaration that the condition was ultra vires the county council, or that it was void for uncertainty, or that the condition was no longer effective having been applicable only to the first occupants.

On appeal from Roxburgh J., who held that the condition was ultra vires and of no effect:—

Held, (1) that the powers conferred on local planning authorities to impose conditions on the grant of planning permission were wide enough to permit conditions prescribing the permitted class or classes of occupants, provided that a condition in that respect, as in others, was intelligibly and sensibly related to the planning scheme and proposals for the area in question.

Dicta of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680 and Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 applied.

(2) That, applying that test, although in certain respects the condition was dissociated from the planning policy expressed in the outline development scheme as necessary for planning the area

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"works on any such land, so far as "appears to the local planning autho-"rity to be expedient for the pur-"poses of or in connection with the "development authorised by the per-"mission; . . ."

S. 36: "Where, under the fore-"going provisions of this Part of this "Act, a local planning authority are "required to have regard to the pro-"visions of the development plan in "relation to the exercise of any of "their functions, then, in relation "to the exercise of those functions "during any period before such a "plan has become operative with re-"spect to the area of that authority, "that authority shall have regard to "any directions which may be given "to them by the Minister as to the "provisions to be included in such "a plan, and subject to any such "directions shall have regard to the "provisions which in their opinion "will be required to be so included "for securing the proper planning of "the said area."

as an agricultural area, it could not be said that the condition could not implement the policy, nor was it invalidated by the disparity with the stated reasons for the condition (which required a topographical limitation not found in the condition itself).

(3) That the condition was not clearly expressed and there might be difficulty in deciding whether certain cases would or would not comply with it, but it was not void for uncertainty.

Decision of Roxburgh J. [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521 reversed.

APPEAL from Roxburgh J.

In May, 1952, one D. D. Clark, the plaintiffs' predecessor in title, applied for permission to build on land at Chalfont St. Giles two cottages for farm workers, and on July 22 permission was granted subject to the following condition, inter alia, that " the occupation of the houses shall be limited " to persons whose employment or latest employment is or " was employment in agriculture as defined by section 119 (1) " of the Town and Country Planning Act, 1947, or in forestry, " or in an industry mainly dependent upon agriculture and " including also the dependants of such persons as aforesaid." Owing to certain difficulties in siting the cottages, Clark's proposal and the permission given for it had to be abandoned, and a slightly different planning proposal was made by him on November 22, 1952. Permission to erect the farm workers' cottages according to his second proposal was granted, upon condition, on December 5, 1952, by the clerk to the Amersham Rural District Council for and on behalf of the Buckingham County Council, the local planning authority, acting under the Town and Country Planning Act, 1947, and the Town and Country (General Development) Order, 1950. The relevant condition was in identical language with that imposed on the earlier permit, but in addition the later permit gave the reason for imposing the condition (pursuant to article 5 (9) of the Town and Country Planning (General Development) Order [2]) as follows: " Because the council would not be prepared to permit " the erection of dwelling-houses on this site unconnected with " the use of the adjoining land for agriculture or similar " purposes."

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[2] Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728), art. 5 (9): " Every such notice [of the local " planning authority's decision] shall " be in writing and (*a*) in the case " of an application for planning per- " mission or approval, where the local " planning authority decide to grant " such permission or approval subject " to conditions or to refuse it, they " shall state their reasons in writing " . . ."

The approval was registered as a local land charge in the register of town planning prohibitions or restrictions and Clark had the two cottages erected. No question arose between him and the council as to the efficacy of the condition.

At the date when permission to erect the cottages was given no development plan had become operative with respect to the Chalfont St. Giles area, but an outline development plan for Buckinghamshire had been drafted by the council in February, 1950. The outline plan was a draft expressly enunciating " the " fundamental matters which must be considered in forming " the framework of the statutory plan." The Chalfont St. Giles area formed part of the Metropolitan Green Belt area, for which planning policy was stated to be as follows: " Although much " of the land included in the Metropolitan Green Belt Ring of " the Greater London plan is not necessarily of great scenic " beauty or highly productive from the agricultural point of view " it is essential that it should be preserved against building " development so as to form a barrier against the further outward " spread of London. . . . The communities in Bucks within the " Green Belt are . . . Chalfont St. Giles . . . It is proposed that " further development of these communities should be restricted " to infilling and rounding off of existing development."

The policy emerging from this statement was still current in December, 1952, and, as no relevant directions had been given by the Minister, the council had, by section 36 of the Act, in granting permission in the Chalfont St. Giles area, to have regard to that outline plan, and by section 14 to " any other material " consideration."

After erection the cottages were first occupied by persons whose employment was covered by the terms of the condition, but on December 31, 1956, the Chalfont and District Permanent Building Society, Clark's mortgagees, conveyed the fee simple in the cottages to the plaintiffs, who were anxious to put in occupation persons whose employment was not within the terms of the condition. The plaintiffs claimed a declaration (1) that the condition was ultra vires the powers of the county council under the Act of 1947, or (2) that it was void for uncertainty, or that on the proper construction of the condition the force had been exhausted, so that the cottages might be occupied without regard to the nature of the employment of the occupants. They also sought rectification of the local land charges register.

Roxburgh J. held that the condition was ultra vires and of no effect and declared accordingly. The council appealed.

J. P. Widgery Q.C. and *Alan Fletcher* for the defendant council, as the local planning authority. The condition was imposed because the properties were in an area forming part of the Metropolitan Green Belt, though a condition of this type would not necessarily be ultra vires the powers of a planning authority outside that area. A local development plan is a relevant consideration on the issue whether to impose a condition.

[*Megarry Q.C.* intervening. When the condition was imposed the "Green Belt" scheme had no statutory force or effect because the development plan had not been finally approved by the Minister.]

The condition derives from section 34 (2) of the Housing Act, 1930, now section 115 (2) of the Housing Act, 1936, and see also section 114 (5) of the Housing Act, 1957, which is in the same terms. If the condition is ultra vires, the validity of the statutory provisions may also be affected, though there are certain differences.

The condition may be badly worded and too wide in its scope, but that does not affect its validity. The only question for the court is whether the authority took into account the proper factors in exercising their discretion. The extent to which the condition was efficient in achieving the planning policy is irrelevant, unless it is shown that the condition is so unreasonable that no authority could reasonably have imposed it. If the planning authority were entitled to consider the effect of development in Green Belt areas and to impose restrictions on occupation on that account, then the precise limits are a matter for the authority and not for the court. As Lord Greene M.R. said in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[3] before the court will interfere the case must be overwhelming that incorrect factors must have been taken into account.

It was reasonable for the local planning authority to adopt the wording used in the Housing Acts. Conditions of this sort were mandatory on the grant of a subsidy under section 3 (1) of the Housing (Financial Provisions) Act, 1938, and they have been well understood in agricultural communities for the last 20 years. The context is different but the problem is the same.

Since, at the material time, the development plan had not been completed, the planning authority had, by virtue of section 36 of the Act of 1947, to have regard to any special guidance from the Minister, and, failing that, to what they thought the plan should contain material to the application. They said that the area was within the intended Green Belt and, therefore, that the application had to be considered on the footing that the Green Belt scheme was already in operation. It was sufficient that the property might fall within that scheme, for it then required preservation until the scope of the scheme was decided.

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[3] [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680.

The Act does not provide for any conditions to be reviewed. That may be a lacuna, but an owner can apply for permission to use the premises for some other purpose, though, strictly speaking, planning powers are limited to cases where there is a change of use in the technical sense.

There is, admittedly, a divergence between the reasons given for imposing the condition and the condition itself, but that does not affect the validity, for the reasons do not disclose that the planning authority have regarded matters which should have been disregarded.

The judge said that a condition regulating the type of occupant could be intra vires if it was suitably worded, but that this condition was ultra vires for two reasons. First, he said that it was too loosely worded and, although the broad purpose might be consistent with planning purposes, the effect in certain circumstances would be inconsistent with that policy. In other words, it was void for inefficiency. Secondly, his Lordship said that it was ultra vires because it was so complex and ambiguous that it was unreasonable. He did not consider the further question whether the condition was void for uncertainty.

The onus is on the landowner to show that wrong considerations were taken into account. Nothing in the present case shows that the matters in contemplation were wrong, or that the local authority were influenced by anything other than the effect of the Green Belt scheme, with, perhaps, the desire not to impose a more stringent restriction than was absolutely necessary. It is conceded that the documents do not state categorically that this condition was imposed with reference to the Green Belt scheme, and the only evidence is that this condition has been currently used for the protection of the Green Belt. The judge did not go so far as to say, on Lord Greene M.R.'s test, that the condition was so unreasonable that no reasonable authority could have reached this conclusion, but he substituted his own test of what was reasonable for the local authority to decide. The *Wednesbury* case[4] was not cited, though the earlier case of

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[4] [1948] 1 K.B. 223.

Kruse v. *Johnson*[5] was. He said that if no guidance was given, the court could consider what factors are material, but some slight guidance is given here.

[ROMER L.J. The burden of showing that the planning authority have taken all relevant matters into account would be on them, but the onus of showing that they had taken into account irrelevant matters would be on the plaintiffs.]

On Lord Greene M.R.'s test the onus would be on the plaintiffs throughout. *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[6] supports the contention that the onus is not on the Minister to prove his motives. Lord Denning stated the principles[7] and said that there must be a link between the actual development which is being sanctioned by the permission and the condition being imposed. In other words, the imposition of the condition must be necessary in consequence of that development being carried out. The judge put his own gloss on that passage and said "any local planning considerations."

[ROMER L.J. The judge said that the object of the condition was to preserve this area as a rural area and that any condition imposed must relate to that object. Applying Lord Greene M.R.'s test, the authority must have regard to what the development plan intended to do with the land, and if it is going to be a rural district they must have regard to that. But having done that, the way they do it is a matter for them and the court will not interfere merely because they have adopted an inefficient method.]

The broad purpose of the condition was to preserve houses for the agricultural population and that is in line with the general planning policy. It is not permissible to inquire what the precise results will be in any particular case.

The *Wednesbury* case[8] dealt with the question of onus, but there is no authority which says that the onus is on the authority to justify what they have done.

[LORD EVERSHED M.R. There was an analogous discussion in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[9]]

The section gives some indication of some material considerations, and it is open to the court to consider what were the material considerations. One of them was plainly the development plan. Lord Greene M.R. contemplated the case where the Act specified the material considerations and he said that it would be assumed that the planning authority had had them in mind unless there was evidence to the contrary.

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[5] [1898] 2 Q.B. 91; 14 T.L.R. 416.

[6] [1958] 1 Q.B. 554, 573; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

[7] [1958] 1 Q.B. 554, 572.

[8] [1948] 1 K.B. 223.

[9] [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

[Romer L.J. Under section 36 the planning authority have only to show that they bona fide formed the opinion and then it is not open to challenge, but on section 14 it would be open to the courts to say that the condition took into account matters which were not relevant.]

The outline development plan for Bucks of February, 1950, is evidence that the county council had already decided on a Green Belt policy for the Chalfont St. Giles area. That is consistent, and must be read, with the reasons given on the particular application, which disclose that the county council were concerned to give agriculture priority and would not allow building unconnected with that purpose. It is a reasonable assumption that reference was made to the outline plan when considering the application. Therefore, so far as the evidence goes, the planning authority have complied with both sections 36 and 14. The obligation to have regard to the development plan is not restricted to the imposition of conditions. It applies also to granting, refusing or imposing conditions, so that, if the local authority had had regard to something that they should have disregarded, it would go to the root of the whole decision and not merely to the condition.

[Lord Evershed M.R. If they had refused permission, there might be a stronger case for saying that they must justify the decision, but the formula used is the same in all cases. Procedure by way of declaration is available.] [Reference was made to *Guildford Rural District Council* v. *Fortescue*.[10]]

It was not pleaded that the present condition could be challenged on the ground that the Minister had failed to prove that the correct considerations were taken into account. It was said that irrespective of his motives he could not impose this condition. The other point does not appear in the plaintiffs' notice, and cannot be raised now. The general proposition is that the onus in challenging jurisdiction must be on the challenger. Lord Denning's test in the *Pyx Granite* case[11] is satisfactory if one asks whether the condition would have been imposed if the permission had not been granted.

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[10] [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643; [1959] 1 All E.R. 111.

[11] [1958] 1 Q.B. 554, 572.

The menace to the Green Belt area is from the cottages which would follow this one if no control was placed on these. This condition would have been unreasonable except on the footing that permitted development was being carried out. Lord Denning was only giving an example of what were material considerations and what were ulterior motives. Roxburgh J. said that the condition was unfair because it was obscure and ambiguous. There is no ground for applying the tests for certainty in gifts by will in this entirely different territory, though, of course, if the condition reaches a particular degree of uncertainty it may be so unpractical that no reasonable authority would have imposed it. While certainty is desirable, ambiguity is not fatal: see *Crisp from the Fens Ltd.* v. *Rutland County Council.*[12] In any individual case it would be possible to decide whether a particular person was a "dependant." It is not necessary to be able to give a complete list of all the persons who might qualify. A landowner would only be subject to prosecution if he failed to comply with an enforcement notice, and an occupier would not be liable. If the landowner was in any doubt he could make provision in the contract of letting. If there was a change of occupation, the local authority would serve an enforcement notice, and if the occupier wished to challenge the notice he could appeal.

Alan Fletcher followed.

R. E. Megarry Q.C. and *C. F. Fletcher-Cooke Q.C.* for the landowner, the plaintiffs. The primary submission is that the condition did not effectuate any proper planning purpose, but it is difficult to keep that point separate from matters germane to the argument on avoidance for uncertainty.

The condition is irremovable. If it is disregarded an enforcement notice may be served, and, if that is disobeyed, the landowner may be prosecuted and fined. That is the sort of consequence that Lord Simonds had in mind when he said in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[13] that the courts should scrutinise with great care to see whether a restriction on the use of property was proper. The meaning of the condition is not clear. It is uncertain whether the restriction on occupation applies to the head of the house or to every person in it. If it applies only to him, there may be anomalous cases where he fails to satisfy the condition although he has living with him (but not dependent on him) sons who are agricultural labourers. Conversely, there may be cases where the head

[12] (1950) 1 P. & C.R. 48, 53; [1950] W.N. 72.

[13] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

satisfies the condition but there are a number of persons living in the house who do not. The meaning of "dependants" is obscure. A gift by will to "dependants" would be void for uncertainty. In this context it is impossible to say whether the relevant dependence is financial, physical, or is determined by family relationship. It is not clear whether the condition operates continuously. A son living in the house might be financially independent only so long as he was employed. It is not clear what would be the position of relatives, married daughters living at home, visitors or lodgers. "Agriculture" as defined in section 119 (1) of the Act of 1947 is very wide in its ambit and would include many persons, such as mink farm furriers, who would not appear to have any territorial link with the area. "Employment "or latest employment" involves difficulties. For instance, a retired tea planter would satisfy the condition, but if he took a temporary job in some other occupation, even for a short time, he would be disqualified.

Even if the definition of "agricultural population" in the Housing Acts had been adopted verbatim, it would have been submitted that the condition did not carry out any planning purposes and that in a planning context it was void for uncertainty. It is not said that a condition of this type would be uncertain in meaning in the context of the Housing Acts. In that context, for example, "dependants" would probably refer to financial dependence. Under the Housing Act the Minister does not have to decide in advance the scope of the condition but merely whether a particular individual to whom he is proposing to make a grant in the exercise of his discretionary power is within the scope of that power. Similar considerations apply to the exercise of a power of appointment: *In re Gestetner Settlement.*[14] A trust, however, would be void unless the class of beneficiaries could be defined beforehand. "Industry mainly dependent on "agriculture" may mean that the industry is dependent on agriculture for its raw materials, or it may be that the industry is supplying urgent agricultural needs. Questions will arise where, for instance, an industry engaged in manufacturing tractors changes to producing motor-cars. With the change, the industry would cease to be mainly dependent on agriculture and at some stage an employee living in one of these cottages would, apparently, be in breach of the condition. "Mainly" could be by reference to profit percentage, numerical production or the value of the products. It is not clear whether the "industry" means the whole range of the industry, or the particular factory, or a department, or the nature of the employment of the occupier within that factory. He might, for example, be an accountant or a cook in the factory canteen. It is impossible to say what test should be applied and no conceivable planning consideration is expressed. A school would normally be permitted development in a Green Belt area, but a schoolmaster would not be able to live in one of these cottages. If the occupier emigrates to Australia and engages in sheepfarming, so long as he sends remittances home to his wife, she would be within the condition, but if he ceased to make provision for her, she would be in breach. The widow of a deceased farm worker would not be "dependent." [Reference was made to *In re Ball*[15] and *In re Gape*.[16]]

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[14] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.

If it is impossible to suggest any planning purpose which is served by the condition as drafted, the court has ample jurisdiction to intervene. The mainspring of the reason given for imposing the condition is that the use of the cottages should be tied to the use of the adjoining land. The reason evinces a planning purpose, but there is no topographical restriction in the condition itself. Identical conditions were imposed in the two successive planning permissions, but the reasons given in the first were different from those given in the second. If the condition served a sensible town planning purpose, the reasons given would be irrelevant: see *Crisp from the Fens Ltd.* v. *Rutland County Council*[17]—but they are a guide to construing ambiguity in a condition. The statutory requirement that the reasons must be stated may not be only to facilitate appeals. If the authority gives an irrelevant reason, they will either have to admit the irrelevancy or stand by the reasons, and if the reasons given do not support the condition imposed, the condition may be invalid. The plaintiffs cannot be required to show what were the reasons for imposing the condition without reference to the reasons stated, for that is the only material available to them. They cannot inquire into the minds of the planning authority. The court should have regard to what the authority had in mind by looking, as the defendants concede, both at what has been done and at the reasons given. Even if the right matters have been considered, if it is impossible to say what proper planning purposes were carried out by the condition, the court can decide that the condition is void. The local authority have no extra-statutory powers and every act done must be tested by reference to their statutory powers. If it is not within those powers, it does not matter what they had in mind or what they should have considered. This is not saying that the court has jurisdiction to interfere in matters of planning policy. The court cannot interfere merely because it is thought that the planning consideration is not satisfactory, but if nobody is able to show that any intelligible planning purpose is served by imposing a particular condition, then that cannot be a proper exercise of the powers given to the authority for planning purposes alone. If the defendants' submission is accepted, a planning authority would be immune provided that it gave no indication of what was in its mind. The same submission was put in the *Wednesbury* case [18] and was rejected.

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[15] [1947] Ch. 228; 63 T.L.R. 94; [1947] 1 All E.R. 458.

[16] [1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579.

[17] 1 P. & C.R. 48.

It would be unfair to expose the landowner to enforcement proceedings because he changes his job. Hardship on the landowner is relevant in considering whether a particular condition could carry out any planning policy. It may show how capricious the result of the condition is. Specific statutory powers must not be used for other purposes: *Pilling* v. *Abergele Urban District Council* [19]; *Prescott* v. *Birmingham Corporation.*[20] Mr. Rowe's second submission in the latter case in the Court of Appeal [21] was substantially the same as that put for the defendants, based on the *Wednesbury* case.[22] The contrary submission is supported by *Roberts* v. *Hopwood.*[23] It was open to the planning authority to have given evidence as to what moved them, but they have not done so. It is not said that no planning conditions can be supported unless the planning authority can prove positively what considerations were regarded, but if no evidence was put forward, then the validity of what has been done can only be judged by what has been done, and in the present case much of what has been done cannot have any planning relevance.

Applying the principle stated by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government,*[24] conditions imposed on giving conditional permission to develop must be of a type which link with the permission given. The permission was to erect human residences, and a valid condition must relate in the planning sense to the occupation and use as a residence. This condition does not relate to how the cottages are used but to the qualifications of the persons using them by reference to work done elsewhere. The planning sense is linked with the particular site, and to be valid the condition should have tied the use of the cottages to the adjoining land in accordance with the stated reasons. That would have related to the kind of use made of the cottages. It is significant that a breach of this condition would be caused by something happening away from the premises—a change of occupation or a change in dependency—and would have nothing to do with the purposes for which the premises themselves were used.

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[18] [1948] 1 K.B. 223.

[19] [1950] 1 K.B. 636; 66 T.L.R. (Pt. 1) 166; [1950] 1 All E.R. 76.

[20] [1955] Ch. 210; [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

[21] [1955] 1 Ch. 210, 228.

[22] [1948] 1 K.B. 223.

[23] [1925] A.C. 578, 589.

[24] [1958] 1 Q.B. 554, 572.

Section 18 (3) gives an indication of the legitimate ambit of planning conditions. The subsection refers to purposes of design, but there is no specific design as a farm worker's cottage. Section 12 (2) refers to development as an act changing the use. The use of these cottages is residential. It is not said that one cannot look further than the broad division between residential and industrial uses, but the statute considers everything in relation to what use is made of the premises. There is no category of dwellings for agricultural workers by reference to the use made of the premises.

Generally speaking, where breach of a condition carries penal consequences, whether by forfeiture of an estate or by enforcement proceedings, the person affected by the condition must be able to see from the time that it applies precisely on the happening of what events the consequences will follow: *Sifton* v. *Sifton*.[25] By-laws have to satisfy a similar standard of clarity: see the cases summarised in Halsbury's Laws of England, 3rd ed., vol. 24, p. 517. This condition would be invalid if it was in a by-law. Before *Kruse* v. *Johnson*[26] the tendency was to hold that a by-law was invalid unless it was clear. A by-law now has to be both certain and reasonable: *Scott* v. *Pilliner*.[27] It would be exceptionally difficult for a landowner to say in advance precisely what acts would result in a breach of this condition. It is uncertain and produces unreasonable results.

There is no half-way house between the view that the condition applies for ever and the view that it applies only to the first occupation and is then spent.

[LORD EVERSHED M.R. As this is a registrable charge, it is unlikely that it was intended to apply only to the initial occupation: see section 18 (4) of the Act of 1947 and section 15 (7) of the Land Registration Act, 1925. The benefit of the planning permission runs with the land.]

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[25] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[26] [1898] 2 Q.B. 91.

[27] [1904] 2 K.B. 855, 858; 20 T.L.R. 662.

The defendants have said that the landowner could ask the local authority to permit residence by anyone, but it is questionable whether such a permission would offer protection against an enforcement notice for breach of the condition.

[Lord Evershed M.R. That is an academic point, because the same authority would be acting in both cases.]

Fletcher-Cooke Q.C. following. This condition has been imposed by local authorities and it is submitted that the use by them of a form of words which comes substantially out of the Housing Acts shifts the onus of proof from the plaintiffs because it indicates that the authority had immaterial points in mind. The duties under the two Acts must not be mixed and the use of these words raises the presumption that they are mixing the duties.

Widgery Q.C. in reply. The condition must be looked at as a whole. The court should look not only at the reasons given but at all the evidence, including the contemporary documents showing the policy. This condition makes a broad division between persons whose employment is such that they may have to live in a rural area and other persons by reference to the agricultural and non-agricultural population. The planning purpose was to keep this as a rural area and it was reasonable to seek to restrict occupation of the houses to those persons who might have to live in the rural area and to seek to keep out the other class. Admittedly, the condition lets in some persons who should be kept out, but it is a matter of policy just how strictly one should legislate. The condition as a whole makes a sensible contribution to the planning policy for the Green Belt area.

It is fundamental that one looks only at the results to throw light on the considerations which the planning authority took into account. The judgments prior to the *Wednesbury* case [28] show the generality of Lord Greene M.R.'s statement: see *Carltona Ltd.* v. *Works Commissioners.*[29] Mr. Rowe's submission in *Prescott* v. *Birmingham Corporation* [30] was fundamentally different from the defendants' submission. He submitted that the authority had a fiduciary duty in handling public money and that they had no discretion to give it away. In *Roberts* v. *Hopwood* [31] it was said that different considerations applied in financial matters. This is an example of delegation of powers by Parliament to the Ministry and the exercise of the delegated power must be strictly within the statutory limits (see *Carltona Ltd.* v. *Works Commissioners*[32]); but nothing in the Act supports the submission that the " use " of a building does not cover the occupation of the user. It is a natural meaning of the language used. If the authority for the condition imposed had been section 14 (2) only, then it might have been submitted that one could not go beyond uses, but subsection (1) has no such qualification. Mr. Megarry bases himself on subsection (2), and even on that subsection the conditions imposed may regulate development or use of land, and any material change of use is development. " Use " in that subsection means something other than " change of use "; it goes beyond merely regulating the broad categories of use, for otherwise the power to control development would be sufficient.

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[28] [1948] 1 K.B. 223.

[29] [1943] 2 All E.R. 560.

[30] [1955] Ch. 210.

[31] [1925] A.C. 578.

It is accepted that if permission is granted to build a dwelling-house, then the permission extends to the use of the dwelling-house when it is erected, but though that permission is implicit in section 18 (3), it is subject to conditions imposed under section 14. On any view the conditions imposed under section 14 override the conditions imposed under section 18 (3). Lord Denning in the *Pyx Granite* case[33] was not laying down a general test governing the circumstances in which the courts will interfere; he was merely stating the principle applicable to the particular circumstances of that case, where the conditions attached to land other than that on which the development was carried out. That was a clear case of subsection (2) of section 14 and he emphasised that in those cases a connection was necessary. Lord Greene M.R. was not dealing with uncertainty. The only authority on that point is *Crisp from the Fens Ltd.* v. *Rutland County Council*,[34] but there the court construed the ambiguity. It is not conceded that the same rules apply both to conditions and to by-laws. Conditions of this sort are only imposed on individuals who seek to take advantage of getting planning permission. An infringement of a by-law results in a penalty being incurred immediately. Here the position can be tested after the enforcement notice has been served.

Cur. adv. vult.

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[32] [1943] 2 All E.R. 560.

[33] [1958] 1 Q.B. 554, 572.

[34] 1 P. & C.R. 48.

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Fawcett Properties Ltd. v. Buckingham County Council.

April 27. Lord Evershed M.R. stated the facts and continued: As is well known, the effect of the Town and Country Planning Act, 1947, was to place all land in England under planning control so that (so far as is relevant to this case) no vacant land could be "developed" by being built upon save with the permission of the local planning authority (in this case the defendant council), which permission might be granted either unconditionally or subject to conditions. Thus it is that section 14 (1) of the Act provided, so far as material: ". . . where "application is made to the local planning authority for permission to develop land, that authority may grant permission "either unconditionally or subject to such conditions as they "think fit, or may refuse permission; and in dealing with any "such application the local planning authority shall have regard "to the provisions of the development plan, so far as material "thereto, and to any other material considerations."

There was in this case at the relevant date no operative "development plan" for the area in question. It follows, therefore, that the obligation of the council under the section was to have regard "to any other material consideration," and it is not in doubt that the effect in the present case of these five words which I have quoted was to introduce and make obligatory for the councils' consideration (there having been no direction by the Minister) the matters indicated by the final words of section 36 of the Act, namely, "the provisions which "in their opinion will be required to be so included" (that is, included in the development plan when operative) "for securing "the proper planning of the said area."

[His Lordship referred to the outline development plan, and continued:] There is no dispute that the area of Chalfont St. Giles, which includes the land in question, was and is intended to form part of what is generally known as London's Green Belt, and, as such, dedicated to rural use and excluded accordingly from any form of urban development. The "reason" given in the planning document of December 5, 1952, is conceded to reflect by its language that purpose: and it is also conceded, as I have already indicated, that by the joint effect of sections 14 and 36 of the Act it was the council's duty in considering Mr. Clark's application for planning permission to have regard to the provision which would in their opinion be required for achieving that purpose.

I take, first, Mr. Megarry's more broad and general attack on the validity of the condition, viz., that in spite of the generality of the language of section 14 (1) of the Act, " . . . such conditions as they think fit," it is not open to the local planning authority to impose a condition in reference to a proposed structure related not to the manner in which the building may be used (e.g., as a residence, or as a shop, etc.), but to the class of persons who may use or occupy it. Upon this point I am content to adopt the conclusion and reasoning of Roxburgh J., who stated that acceptance of such an argument would involve reading some gloss or qualification into the language chosen by Parliament and that he could find no sufficient justification for doing so. The judge observed (and I respectfully agree with him) that the examples given in subsection (2) of the section are expressed to be without prejudice to the generality of the preceding subsection, and cannot, therefore, properly be invoked for the very purpose of limiting that generality. I add that, in my judgment, the fact that the terms of section 12 of the Act in general provide that a material change in the user of premises will constitute development lends support to the interpretation of the general language of section 14 (1) according to its natural sense.

Though I am taking the point out of its order, I can also deal here, and briefly, with Mr. Megarry's last submission, viz., that on its true construction the condition only purported to apply by way of restriction to the first occupation of the cottages, so that its force must now be taken as spent. Mr. Megarry did not develop the argument at any length and he will, therefore, I hope, forgive me if I reject it somewhat summarily. It is sufficient, in my view, to say that I do not think the language of the condition can fairly be so construed and that no planning authority could sensibly in a case of this kind be supposed to be discharging its statutory duty by imposing a condition so restricted.

To my mind the most difficult question is whether, when regard is had, on the one hand, to the planning scheme and proposals of the council, which may be deduced from the outline development plan, and the reasons given by the council for the imposition of the condition in December, 1952; and, on the other hand, to the scope and effect of the condition itself according to a fair interpretation of the language, the latter ought to be treated as having been beyond the council's powers, not being fairly and reasonably related to the former. In formulating the question, I have, as a matter of language, substituted (by reference) the words " the planning scheme and proposals of "the council" for the words used by Roxburgh J., "the local "planning considerations."[1] Both forms of words depart somewhat from the language of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*,[2] where he spoke of the requirement that the conditions should "fairly "and reasonably relate to the permitted development." The test proper to be applied, however it be expressed, is derived from the last four lines of section 14 (1) of the Act as they are qualified in the present case by the terms of section 36 of the Act. The joint effect of these provisions being (so far as relevant to the present case) that in dealing with Mr. Clark's application to build the two "farm workers' cottages" the council were bound to have regard to the provisions which, in their opinion, would be required to be included in the then contemplated development plan in respect of this area for securing its proper planning. It seemed at one time that there might be a question raised whether it was the duty of the council to assume the burden of proving positively what were the matters to which in fact they had had regard. But Mr. Megarry has in this respect eased our burden, for he has conceded that (prima facie, at any rate) it is not necessary that the council should prove these matters affirmatively. He concedes that they should be assumed to have had regard to the proper factors unless the objector to the condition can produce evidence to the contrary (as has not been done in this case) or unless the facts of the case, and particularly the terms of the condition itself, lead as a matter of necessary or proper inference to a contrary result.

So far there is no conflict (in principle at any rate) between Mr. Megarry and Mr. Widgery. But what is said by Mr. Megarry (and what was, I think, found by the judge) was to this effect: that since the contemplated development plan for the relevant area involved its use and preservation as a rural (that is, an agricultural) area, then the provisions which would have to be included in such a plan and to which, therefore, the council must have regard, must be provisions designed to achieve that end; and that the terms of the condition, fairly construed, were in truth inconsistent with such provisions or requirements. Without, therefore, contending (as I understood him) that the court ought necessarily here to infer failure on the part of the council to have regard to the proper requirements of the intended plan, Mr. Megarry submitted, in reliance upon

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[1] [1958] 1 W.L.R. 1161, 1166; [1958] 3 All E.R. 521.

[2] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

Lord Denning's language, that the terms of the condition bore no fair or reasonable relation to the intended plan, and, therefore, that the condition must be treated, according to Lord Denning, as "invalid." Put another way, Mr. Megarry said that if it be shown that the terms of the condition bear no fair or reasonable relation to the intended plan, then, whatever the council did or intended to do or even thought they did, they have or must be taken to have lost sight, in framing their condition, of the matters which were relevant for their consideration; and the result is, therefore, the same as if they had not properly ever considered such matters at all.

On the other side, Mr. Widgery, while not seeking to qualify the true effect of Lord Denning's language, invoked also the terms of Lord Greene M.R.'s judgment in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[3] as showing that in such circumstances as the present if the local authority has not misdirected itself by paying regard to the wrong matters, then the question of reasonableness is, prima facie, at any rate, one for the local authority's discretion; and that, in regard to such discretion, the court will not act in an appellate capacity, substituting its own opinion for that of the local authority.

Since it is at this point that the arguments of Mr. Megarry and Mr. Widgery part company, I hope I shall be forgiven for substantial citations from Lord Greene M.R. He said in the *Wednesbury* case[4]: "What, then, is the power of the courts? "They can only interfere with an act of executive authority if "it be shown that the authority has contravened the law. It is "for those who assert that the local authority has contravened "the law to establish that proposition. On the face of it, a "condition of the kind imposed in this case is perfectly lawful. "It is not to be assumed prima facie that responsible bodies like "the local authority in this case will exceed their powers; but "the court, whenever it is alleged that the local authority have "contravened the law, must not substitute itself for that "authority. It is only concerned with seeing whether or not "the proposition is made good. When an executive discretion is "entrusted by Parliament to a body such as the local authority "in this case, what appears to be an exercise of that discretion "can only be challenged in the courts in a strictly limited class "of case. As I have said, it must always be remembered that "the court is not a court of appeal. When discretion of this

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[3] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

[4] [1948] 1 K.B. 223, 228.

"kind is granted the law recognises certain principles upon "which that discretion must be exercised, but within the four "corners of those principles the discretion, in my opinion, is an "absolute one and cannot be questioned in any court of law. "What, then, are those principles? They are well understood. "They are principles which the court looks to in considering "any question of discretion of this kind. The exercise of such a "discretion must be a real exercise of the discretion. If, in the "statute conferring the discretion, there is to be found expressly "or by implication matters which the authority exercising the "discretion ought to have regard to, then in exercising the "discretion it must have regard to those matters. Conversely, "if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not "be germane to the matter in question, the authority must "disregard those irrelevant collateral matters. There have been "in the cases expressions used relating to the sort of things "that authorities must not do, not merely in cases under the "Cinematograph Act but, generally speaking, under other cases "where the powers of local authorities came to be considered. "I am not sure myself whether the permissible grounds of attack "cannot be defined under a single head. It has been perhaps a "little bit confusing to find a series of grounds set out. Bad "faith, dishonesty—those, of course, stand by themselves— "unreasonableness, attention given to extraneous circumstances, "disregard of public policy and things like that have all been "referred to, according to the facts of individual cases, as being "matters which are relevant to the question. If they cannot "all be confined under one head, they at any rate, I think, "overlap to a very great extent." Again, in reference to the judgment of Atkin J. in *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill*,[5] Lord Greene M.R. said[6]: "I think that Atkin J. "was right in considering that the restrictions on the power of "imposing conditions were nothing like so broad as the majority "thought, but I am not sure that his language may not perhaps "be read in rather a different sense from that which I think he "must have intended. I do not find in the language that he "used any justification for thinking that it is for the court to "decide on the question of reasonableness rather than the local "authority. I do not read him as in any way dissenting from "the view which I have ventured to express, that the task of

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[5] [1915] 2 K.B. 49; 31 T.L.R. 138.

[6] [1948] 1 K.B. 223, 233.

"the court is not to decide what it thinks is reasonable, but to "decide whether what is prima facie within the power of the "local authority is a condition which no reasonable authority, "acting within the four corners of their jurisdiction, could have "decided to impose."

In my judgment it follows from the citations I have made that if the condition in the present case is to be held "invalid" (that is, beyond the competence of the council to impose) it must be shown that its terms, upon the face of them, are demonstrably unrelated to the proposed plan. So that the result is the same as if the council had never had the proposed plan and its requirements really or properly in its mind at all. In other words, it is not, in my judgment, enough that the terms are not such as, in the opinion of the court, are best designed to subserve or promote the intended plan; or that, while capable of subserving or promoting the plan, they do so inefficiently and are or may be also capable, in practice, of creating anomalous situations and permitting occupation of the cottages by persons who have no concern with the intended agricultural use of the adjoining property.

The main criticism of the condition has been in two directions: first, that there is no limitation (as regards either the permitted occupants or as to the agricultural or industrial enterprises covered by the terms of the condition) to the adjoining district; and, secondly, that the phrase "an industry mainly "dependent upon agriculture" covers a type of enterprise not only vague and extremely wide in its scope, but also unrelated to the (supposed) rural requirements of the neighbourhood.

These objections are formidable. But after much consideration and, indeed, some vacillation of opinion, I have come to the conclusion that in the light of Lord Greene M.R.'s exposition they are not sufficient to "invalidate" the condition. It is to be remembered (1) that the subject-matter to which the condition relates is two small "farm workers' cottages" in a rural area, and (2) that the condition is intended to persist for an indefinite period of time. In these circumstances it seems to me as a practical matter that in the foreseeable future and, at any rate, in at least nine cases out of ten, the effect of the condition is to limit the use of the cottages to the occupancy of persons who have a direct interest as workers in the agricultural requirements of the area; and that, although the language of the condition would allow to qualify for occupation other persons who would have no such concern, for example (to cite extreme instances used in the course of the argument), an ex-employee of a sheep farm in New South Wales, or the servant of a canning factory in a neighbouring county, the result is only to show that the council have not limited the class of occupancy in the most strict or efficient way or in the way they might have done had they had the advantage before drafting the condition of hearing the arguments in this court. In other words, I have in the end come to the conclusion both (a) that the terms of the condition do not suffice to show that the council failed, or must be deemed to have failed, to have regard to the matters which, by the terms of the statute, they should have regarded, and (affirmatively) (b) that the terms of the condition are fairly and also reasonably (in the sense of intelligibly and sensibly, if not most economically and efficiently) related to the council's planning scheme and proposals.

It will be seen that I have used, throughout, the phrase "planning scheme and proposals" as being, in my view, most appropriate to the circumstances; but I do not intend any difference from Roxburgh J.'s phrase "local planning considerations," and I also agree with Roxburgh J. in thinking that Lord Denning had no different intent by his words "the permitted development," which could in strict use of language mean, in the present case, only the two cottages themselves. But Lord Denning was not intending to lay down a precise and governing formula for all cases of this kind, nor had he in mind or under consideration the problem which is raised in this case. I also disclaim, for my part, an intention to lay down some precise and governing formula; but I have ventured, in the light of Lord Greene M.R.'s judgment in the *Wednesbury* case,[7] to interpret Lord Denning's words "fairly and reasonably relate" as meaning "intelligibly and sensibly," and not as indicating that the court must approve the condition as being a "fair and reasonable" exercise of the planning authority's discretion, judging, that is, of the fairness and reasonableness and so inevitably to some degree at least acting in an appellate capacity in regard to the authority's discretion.

It was the view of Roxburgh J. that since by the terms of the condition no preference was given to local agricultural workers over, say, employees of more distant canning factories, therefore the condition failed "fairly and reasonably" to relate to the proposed local plan; in other words, that the condition, to attain the required standard, should have provided that the class of permitted occupants other than purely local farm workers should only be entitled to live in the cottages if there were no strictly local applicants. Again, it was the view of the judge that the inclusion of industries mainly dependent on agriculture could not (possibly) be relevant to the intended local plan; and in considering the implication of the word "fair" he was of opinion that the local authority must be "fair" to all classes of the community which they represent.

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[7] [1948] 1 K.B. 223.

These matters are beyond question weighty criticisms of the efficiency of the condition in its relation to the proposed plan, though, as regards the last point, I feel some doubt of the way in which the condition may be said to have failed (relevantly) in fairness to the general community. But for reasons which I have already tried to state, I have in the end come to the conclusion that these criticisms, being qualitative in character, do not suffice to disable the condition altogether, though I share my brethren's hope that its future use will be at the least carefully considered. Thus, if it is legitimate, for example, to consider whether the condition should have given priority to purely local farm workers, there seems to me to be logically no stopping short of reviewing the local authority's discretion in all its aspects, and rejecting the condition altogether if, in the end, it fell short of what the court would itself acting fairly and reasonably in relation to the plan have contrived.

There remains Mr. Megarry's attack on the condition on the ground that its language is void for uncertainty. What, asked Mr. Megarry, is the significance and effect of the word "occupation"? Is it intended to refer to occupation as of some right, that is, as tenant or licensee? Or does it extend to any person who for any reason and at any time happens to reside in the houses? Again, who are intended to be covered by the term "dependants"? Is financial dependence intended? And, if so, must such persons be in fact financially dependent and how at any given moment of time can such facts be ascertained? More difficult still, what is the scope and effect of the phrase "industry mainly dependent upon agriculture," and is it relevant in what capacity the "occupier" is employed by such an industry? Finally, Mr. Megarry observed that, prima facie, the condition might be broken as a result of some fact (e.g., change in the nature of the employment) occurring after the "occupation" had been first entered into. It is undeniable that these criticisms have much force. But on the whole I conclude that on this point also (upon which it was, in the circumstances, unnecessary for the judge to reach a decision) the plaintiffs should not succeed. It is not difficult in the case of any general formula to suggest or imagine instances in which a difficulty might arise in saying whether the instance would or would not be within the formula; but it does not follow as a consequence that the formula should in vacuo, as it were, and in advance be held void. It has to be remembered that the present condition is related to two small farm workers' cottages. In that context I cannot think that any real difficulty arises, or would be likely to arise, in saying whether any "occupation" was within the condition or (as indeed Roxburgh J. thought) in saying what was meant by "dependants." It is no doubt true that a subsequent change of employment might take an "occupancy" outside the permission allowed by the condition, though within it at the occupancy's commencement. But these considerations are pertinent, as I think, rather to the argument on ultra vires than to that on construction. The expression "industry mainly "dependent upon agriculture" is indeed very vague and wide. But the real question is whether, if any question arose in the future, was a proposed occupant or was he not employed in such an industry, the parties or the court would be unable to give a certain answer. I am not persuaded that they could not. The judge took the view that the inclusion of this phrase would presently or in the future involve an "extensive and expensive "inquiry" to find out what industries were comprehended. But with all respect to him, I do not think this is so. In no circumstances and at no time would it, so far as I can see, be necessary to discover and make, as it were, a list of all the industries included by the phrase.

It was contended that since this condition was promulgated by a local authority in exercise of its statutory power, it was fairly analogous to a by-law, more particularly since penal consequences might ensue from its breach. It is true that the courts have on more than one occasion expressed the view that by-laws should be clear and certain in effect (see Halsbury's Laws of England, 3rd ed., vol. xxiv, para. 951, and cases there cited), though there is also authority for the view that the courts will not be astute to hold by-laws void and of no effect on the ground of obscurity. (See *Kruse* v. *Johnson*,[8] *per* Lord Russell C.J.) But, in my judgment, the analogy between the present condition and a by-law is not a true one. A by-law is a local but within the locality a general regulation; this condition was an expression of the terms on which the Bucks County Council informed Mr. Clark that they were prepared to grant to him permission to build his cottages, and the terms were at least satisfactory to him, for he built the cottages and no difficulty arose during his ownership in giving effect to the condition. But further, though penal consequences may follow upon a breach of the condition, they do so, as it were, at a remove. The first step which the local authority must take if they allege a breach of the condition is to serve an enforcement notice; and that notice may be challenged by the landowner or the tenant (as the case may be) before the local justices. It is only after the service of the notice and (if it has been challenged) the failure of the challenge that the local authority may invoke the penal provisions of the Act. These provisions seem to me to provide reasonable protection, at any rate, to the landowner in a case in which, because of difficulty or obscurity in the language of the condition, there is doubt whether the acts complained of constitute a breach.

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[8] [1898] 2 Q.B. 91, 99; 14 T.L.R. 416.

But there is another consideration which has appreciably affected my mind upon this matter. The language of the condition has been taken, so far as relevant, ipsis verbis, from the definition of the phrase "agricultural population" in section 34 (2) of the Housing Act, 1930, now section 115 (2) of the Housing Act, 1936.[9] It is no doubt true that we are asked to construe a condition in the permit issued by the Bucks County Council in December, 1952, and not a section of the Housing Act. It may also be true that a collection of words can be reasonably clear in one context and obscure to the point of voidness in another; and it may further be that the administrative difficulties capable of arising from the formula in the Housing Acts (which are, so far as relevant, concerned with the grant of an annual subsidy in respect of premises occupied by a member of the "agricultural population," as above defined) are less than those which may emerge from a user of the formula in a condition imposed under the Town and Country

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[9] Housing Act, 1936, s. 115: ". . . "(2) . . . For the purposes of this "subsection, the expression 'agricul- "'tural population' means persons "whose employment or latest employ- "ment is or was employment in "agriculture or in an industry mainly "dependent upon agriculture, and "includes also the dependants of such "persons as aforesaid; the expression "'agriculture' includes dairy-farm- "ing and poultry-farming and the "use of land as grazing, meadow, "or pasture land, or orchard or osier "land, or woodland, or for market "gardens or nursery grounds; . . ."

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Planning Act. Nevertheless, it seems to be inescapable that, if Mr. Megarry's arguments that the language in the condition to which I have referred is void for uncertainty in the context of the condition, it is no less void for uncertainty in the context of the Housing Acts. I do not, of course, say that forms of words occurring in an Act of Parliament are, because they so occur, sacrosanct against being held void for obscurity and uncertainty; but the court will, in my opinion, be slow to come to such a conclusion on words which have been on the Statute-book for more than a quarter of a century and have, during that time, doubtless been many times acted upon.

For the reasons which I have tried to state, I come therefore to the conclusion that we ought not to hold the condition in the present case void for uncertainty.

It follows, in my opinion, that all the challenges made upon the efficacy and validity of the condition should be rejected and that the appeal should be allowed accordingly.

Romer L.J. The ground upon which the judge based his declaration that the condition subject to which the defendants gave their approval under the Town and Country Planning Act, 1947, for the erection of the two cottages with which these proceedings are concerned was ultra vires and of no effect was, in substance, that the condition did not effectuate any proper planning purpose. The validity of the condition was impeached in the court below, as it was before us, on other grounds as well, but I will consider first the one which I have already mentioned.

At the date when the defendants gave their permission for the building of the cottages, namely, December 5, 1952, no development plan had become operative with respect to the Chalfont St. Giles area of the defendant council. An outline development plan for Buckinghamshire had, however, been drafted in February, 1950. [His Lordship referred to the outline plan as set out above and continued:] The policy which emerges from this statement was still current in December, 1952, and, as no relevant directions had been given by the Minister, the defendants had, in granting development permission in the Chalfont St. Giles area, to have regard to the outline development plan (section 36 of the Act) and to "any other material considerations" (section 14). There can be no doubt but that the policy stated in the outline plan as set out above constituted a proper planning purpose or that conditions calculated to further that purpose could properly be attached to permission to develop in the area in question. Before considering the effect of the condition which the defendants did in fact attach, and which has resulted in this litigation, it is necessary to note the reason which the defendants gave for imposing it: "Because the council would "not be prepared to permit the erection of dwelling-houses on "this site unconnected with the use of the adjoining land for "agriculture or similar purposes." The meaning of this reason would appear to be that the council would only allow houses to be built on the site provided that their use, when erected, would be connected with the agricultural use of the adjoining land. The reason, so interpreted, is in conformity with the policy stated in the outline development plan and would seem to show that the defendants, in framing it, were aware of the obligation imposed upon them by section 36 of the Act. The plaintiffs contend, however, that the same cannot be said of the condition itself which, in their submission, did not implement either the planning policy as adumbrated in the outline development plan, or any other proper planning policy, and was in any event at variance with the reason given for imposing it. I will not repeat the terms of the condition, for they have already been stated in the judgment of Lord Evershed M.R. They are clearly open to criticism in more than one important respect. But a preliminary question which, as it seems to me, has to be considered is whether a condition which is attached to a permission to build enjoys the same degree of protection from review by the courts as is enjoyed by planning policies. That protection or immunity has been recognised in several decisions and the principle underlying it has never, perhaps, been more clearly stated than in the *Wednesbury* case,[10] which has been fully discussed and analysed by Lord Evershed M.R. The effect of that and other decisions is that if there were any doubt as to the validity of the policy which I have extracted from the outline development plan (which in my judgment there is not), the courts would only intervene if satisfied that the defendants must have taken irrelevant matters into consideration or failed to pay regard to matters which were relevant. Now, conditions attached to development permission do not strictly constitute planning policy; they are rather means of effectuating a policy already pre-determined. I think nevertheless that they are entitled, equally with the policy which they are designed to implement, to the shelter of what I might call the *Wednesbury* [10] umbrella. The reasons for giving that shelter to decisions on policy are, in my opinion, equally applicable to the machinery which is essential for rendering those decisions effectual. Accordingly, conditions such as that now in question will not be invalidated on grounds of ultra vires, in my judgment, except on the contingencies indicated in the *Wednesbury*[10] line of authority.

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[10] [1948] 1 K.B. 223.

The plaintiffs' principal contention, in brief, is that the terms of the condition, whether taken by themselves or in conjunction with their probable or reasonably possible consequences, show that the defendants must have paid regard to irrelevant considerations or failed to take relevant elements into account. They rely on the discrepancy between the condition and the planning policy as outlined in the outline development plan and also on the disparity between the condition itself and the reason which the defendants gave for its imposition.

Taking these two objections in order, the plaintiffs' first attack is based upon the scope of the condition which, says Mr. Megarry on their behalf, is unrelated to the outline policy, or to any other sensible planning policy. Subject to his other submission on ultra vires, Mr. Megarry concedes that parts of the condition, if isolated from the rest, would constitute a perfectly proper condition to be attached by the defendants when permitting the erection of the cottages. Thus, if the condition had been that "the occupation of the houses shall be limited to persons whose "employment is employment in agriculture as defined by section "119 (1)" of the Act of 1947 Mr. Megarry admits that the objection now under consideration could not be advanced. The condition is, however, not so limited and the plaintiffs submit that the excess is destructive of the whole. A small excess, they say, if trifling enough to attract the maxim "de minimis," would be innocuous, but the condition as framed lets in so many people as authorised occupants of the cottages who might have no connection with agriculture at all as to show that the defendants demonstrably lost sight of their obligations as the planning authority when they drafted it. In this connection the plaintiffs rely in part on the phrases "or was employment in agriculture" and "including also the dependants of such persons as aforesaid," but their main attack is upon the reference to "an industry "mainly dependent upon agriculture." Apart from the uncertainty as to what this expression means, the plaintiffs suggest that the owners of the cottages could let them to industrial workers whose job was some miles away in preference to local agricultural labourers who needed a home which was close to their work. Many other illustrations were also given in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages would bear no relation to any sensible planning policy and certainly not to the policy outlined in the outline development plan. Mr. Widgery, for the defendants, frankly admitted that curious and anomalous positions might arise under the terms of the condition and that certain persons whose connection with agriculture was non-existent or remote might qualify as tenants whilst other persons, who might ordinarily be expected to qualify, would find themselves excluded. But he contended that the condition makes a broad division between persons whose employment is such that they may have to live in a rural area and persons whose employment is such that they need not, i.e., a distinction is in effect drawn between the agricultural population and others; that the effect of the condition is to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore makes a sensible contribution to the retention of the rural character of that part of the county; and that it accordingly is in substantial and reasonable conformity with the policy contained in the outline development plan, and none the less because of the admitted possible anomalies. The condition, said Mr. Widgery, is right in principle and imperfection of detail affords no sufficient ground for invalidating it or indeed, on the authorities, for its review by the court at all. I think on the whole, that Mr. Widgery's contention should be accepted. Although the condition is most unfortunately worded and absurd results could follow having regard to its terms it does seem to me that, broadly speaking, it is in line with the outline development plan. It is not possible to say that the condition *could* not implement the policy outlined in that document; on the contrary, it seems to me that it almost certainly will implement it, notwithstanding that it is dissociated from the policy in certain of its aspects. Assuming, as I do, that the condition is entitled to the same limited immunity from criticism and review as the defendants' planning policy itself, the plaintiffs have not satisfied me that the defendants must, in imposing it, have regarded the irrelevant or disregarded the relevant and thus laid themselves open to challenge. The plaintiffs further contend, as already mentioned, that the condition in no way reflects the reason which the defendants gave for imposing it. The point and force of the criticism is that by the "reason" the defendants evinced an intention that the use of the cottages should be connected with the stated use of the adjoining land whereas the condition itself imposes no topographical limitation on the class or work of permitted occupiers. That this disparity between the condition and the reason exists cannot be denied. On the footing, however, which I accept, that the condition is broadly in line with the defendants' general planning policy, it cannot, in my judgment, be invalidated because of some inconsistency with a reason which, as I have earlier indicated, is also in line with the policy. Moreover, as a matter of practical common sense it is probable in the highest degree that, if the condition is sustained, these two "farmworkers' cottages" will in fact be tenanted by agricultural workers who are employed on the adjoining land.

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[10] [1948] 1 K.B. 223.

Turning now to Mr. Megarry's main submission on the ultra vires issue, this is clearly stated in the plaintiffs' notice on this appeal in the following terms: "It was not within the "powers of a planning authority to prescribe conditions limiting "the occupation of a new building with reference to the per-"sonality of the occupier but only with reference to the nature "of the user thereof." The submission is that a planning authority cannot specify the persons who may live in a house but only the purposes for which it is to be used. This appears to put a limitation upon the power of the local authority which does not appear in section 14 of the Act nor in any other of its provisions to which our attention was called. It is not a very easy point to follow. The argument apparently concedes that the defendants in the present case could have made it a condition that the two cottages should only be used for the purpose of housing agricultural workers, and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. However that may be, Mr. Megarry was constrained to admit that this fetter which he sought to place on a planning authority's power to impose conditions might be removed in certain cases. For example, I understood him to concede that a condition limiting occupation to workers on a neighbouring farm would be valid. It seems to me that such a condition would clearly be intra vires of the authority, as also would be a condition limiting the occupation of proposed new dwellings near a colliery to persons employed in it. Exceptions such as these (and many more were suggested in argument) afford, as it seems to me, compelling reasons for rejecting a restriction for which, in my judgment, no sufficient warrant is to be found in the Act itself.

It remains to consider whether the condition imposed by the defendants is void for uncertainty, and this question has caused me considerable doubt. All the members of this court in *Crisp from the Fens Ltd.* v. *Rutland County Council*[11] stressed the importance of conditions such as those under consideration being clearly expressed. And, indeed, they were clearly right in doing so. A man's right to do what he likes with his own property has, of course, long since been abrogated in what the State conceives to be the interests of the community as a whole. But if a man is subjected to restrictions upon the use of property which is his, and for which he has paid, it is at least reasonable that he should know with some precision what those restrictions are. If the condition which the defendants imposed on Mr. Clark had been (for some other purpose) enshrined in a by-law, the breach of which would have involved him or anybody else in criminal proceedings, I should imagine it highly probable that the by-law would have been held invalid on the ground of uncertainty (*Scott* v. *Pilliner*[12]). The main reason why I take that view is the difficulty, which might frequently arise, of knowing whether an industry is or is not mainly dependent upon agriculture; or, in the case of an industry which is so dependent, whether and when it ceases to be so when it subsequently, and perhaps gradually, changes its activities. However, the condition is not a by-law and an enforcement notice for its breach is not a criminal proceeding. Under sections 23 and 24 of the Act of 1947 the defendants could serve an enforcement notice on the owners and occupiers of the cottages if the condition were broken, and if this were disregarded penal consequences might ensue for the occupiers, but not for the owners, unless they were shown to have caused or permitted the continued non-observance of the condition. Nevertheless, owners whose properties are subjected to such conditions as that imposed on Mr. Clark can have no clear idea as to what will be regarded as a breach of the condition and what will not; and this would in many, and possibly most, cases lead to difficulties in selling or letting the property, with a consequential depreciation in its value, trouble between landlord and tenant and considerable inconvenience to both. It is, in my judgment, quite wrong that a condition couched in such vague and ambiguous terms should be imposed by any planning authority, and I can only hope that it will never be imposed again. I feel there are two difficulties, however, in holding that the condition is invalid for uncertainty. In the first place, its language so far as relevant, is statutory in the sense that it was used in the Housing Acts of 1930 and 1936. That fact, in itself, would not operate as a deterrent to invalidating the condition on the ground that no sensible meaning could be attributed to it in some of its aspects. What, however, weighs with me is that it was not suggested before us that any difficulty or disputes have arisen from the language used in the Acts of 1930 and 1936; from which it is a legitimate inference that the statutory provisions in question have not worked unsatisfactorily in practice. Mr. Megarry pointed out that those provisions in the Housing Acts appear in a different context, and for a different purpose from those of the condition now in question, for they were introduced in connection with applications for subsidies. Mr. Megarry said that on such applications it is unnecessary to inquire in advance as to the exact limit of the permitted occupancies, and that the contributing authority need only satisfy itself whether a particular person who is proposed for occupation is an agricultural worker or not. Whilst not disregarding the force of this comment, I feel that it would be a strong thing to say that language which has been acted upon (albeit for a different purpose) for years, and without apparent difficulty, is incapable of sensible meaning. Secondly, one cannot divorce the terms of the condition from the subject-matter of the permission. This was not a large private residence of the kind which might be let for a term of years. The subject-matter was a pair of farmworkers' cottages to be built in an agricultural area. I have earlier indicated the probability that these will be let to persons who work on the neighbouring land. It is a further probability that such persons would have weekly tenancies or quarterly tenancies at most. There would not be the same difficulty arising from the condition in relation to such tenancies as might well arise if a property were let for a term of years, e.g., trouble between landlord and tenant. This appears to me to be a legitimate element to take into account; and combined with the Housing Act ancestry of the language in question it is, I think, enough (though only just enough) to save the condition from destruction. With some reluctance, therefore, and more than a little doubt, I am of opinion that this point, too, should be decided in the council's favour.

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[11] (1950) 1 P. & C.R. 48.

[12] [1904] 2 K.B. 855; 20 T.L.R. 662.

If, then, the condition is neither ultra vires the defendants nor void for uncertainty, the plaintiffs can only succeed on this appeal if they can establish that the force of the condition is now spent. For this point they rely in their statement of claim on the fact (admitted by the defendants) that after the cottages had been erected by Mr. Clark they "were first occupied for a substantial "period by persons whose employment was covered by the terms "of the aforesaid condition." Mr. Megarry submitted the point for our consideration but did not pretend that it was his best one. It is quite clear, to my mind, from the terms of the condition and of the reason, that the former was intended to have permanent, and not merely temporary, force and effect. The question needs no development or elaboration, so I will merely say that, in my opinion, it must be decided adversely to the plaintiffs.

For the above reasons, and those stated by Lord Evershed M.R., I agree that the appeal should be allowed.

PEARCE L.J. The council are, by the terms of section 14 of the Town and Country Planning Act, 1947, entitled to grant permission "subject to such conditions as they think fit." The *Wednesbury* case [13] makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, that is, that they disregarded something which they should have taken into account or regarded something which they should not have taken into account. The onus of showing this is on the person seeking to upset the condition imposed by the authority. That onus may be discharged either by showing from the terms of the condition itself that the authority cannot have taken into account the right considerations or by extrinsic evidence to that effect. The principle has not been affected or altered by *Prescott* v. *Birmingham Corporation.*[14] That case was decided on the ground that the corporation owed a fiduciary duty to the ratepayers and had misapprehended the nature and scope of the discretion vested in them. Here there is no such element.

When no reasons are given and decisions of the authority present what Lord Sumner called in another context "the "inscrutable face of a sphinx," it is hard to discharge such an onus. However, in the case of conditions imposed under section 14 it has been provided (by a statutory rule and order) that reasons must be given. No doubt the purpose of that is to help and to inform the persons on whom conditions are imposed. Moreover, by the last four lines of section 14 (1), and by section 36, indication has been given of the matters which the authority must take into account. But the general principle remains that the condition cannot be upset by this court unless it be shown that the authority have not taken into account the right matters.

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[13] [1948] 1 K.B. 223.

[14] [1955] Ch. 210; [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

Mr. Megarry argues that the court can criticise and interfere with the condition itself, even if the right matters have been taken into account. With all respect to his argument, I do not think that that is the right approach. But it is perhaps rather a question of words than a matter of substance. He is quite right to my mind in suggesting that the court will interfere if a condition is ridiculous. But the reason for the interference is that the court will conclude from the folly of the condition that, however good the reasons which the authority say they took into account, they cannot, in fact, have taken into account the right considerations. For one essential matter which the authority must take into account is the imposing of an intelligible condition which can have some effect in achieving the other matters which they have properly taken into account. Thus, although he and Mr. Widgery travel by a different route in their arguments, they arrive at results which are not very far apart.

The court will, of course, hold a condition ultra vires if it does not " fairly and reasonably relate to the permitted development " (see Lord Denning's judgment in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [15]), but in this case it does so relate. Here there is no extrinsic evidence that the authority did not take the right matters into account. In my view, therefore, the question in the case before us is this. The authority having on the face of the expressed reasons taken the proper matters into account, can one infer merely from the possible absurdity or the inefficiency or uncertainty of the condition that they did not in fact do so? If the condition is absurd, or if it is sufficiently uncertain or inefficient, or sufficiently combines these qualities, I should have no hesitation in so inferring. So viewed, the question of uncertainty is not a separate point but merely one of the points whose cumulative effect may prove that the council cannot have taken the right things into account. There is no doubt that the condition is cumbrous and unsatisfactory, and can in extreme instances produce ridiculous results. There could be circumstances in which the cottages could be occupied by rich retired canners from overseas or various other unsuitable persons who, like wraiths, have glided in and out of the arguments during the hearing of this case. But there are many legal principles which on their border-lines in some unlikely set of circumstances produce injustice or even absurdity. And in the case of a condition seeking to affect the character of the local population in the complexities of modern life, there may be difficulty in ensuring that application of that condition cannot at times produce ridiculous results.

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[15] [1958] 1 Q.B. 554, 572.

To my mind, therefore, the possibility of absurdities is not in itself the true test. The test is: Are the absurdities and anomalies and uncertainties not merely theoretically possible but also so probable that they neutralise any beneficial results that the condition could have from a town planning point of view? And, therefore, is the net effect of the condition, looked at broadly, that it cannot be said to advance the town planning objects which are its ostensible justification? If a reasonable person could hold that it would so advance the town planning objects, then the court should not interfere. In framing the condition the authority have taken the wide, loose definition of "agricultural population" (to which, in general terms, they wished to limit the occupation of the cottages) from the Housing Act, 1936, s. 115 (2), together with the extended definition of "agriculture" contained in section 119 (1) of the Town and Country Planning Act, 1947. But it is no answer, as Mr. Megarry rightly says, to an accusation of uncertainty that the condition contains words used in an Act of Parliament in another context. Had the clause ended at the words "or in forestry," most of the possible absurdities and uncertainties would have been avoided. The remaining words were unfortunately added, presumably with an intention of liberality, to increase the field of the possible occupants. And it would be unfortunate if words added to give a more liberal scope should destroy the whole condition. From a practical point of view I do not feel that the uncertainty is likely to produce expense or injustice. If a would-be tenant is on the border-line, he would probably not be accepted. And, if he was accepted, the justices would in any enforcement proceedings feel both bound and inclined to give the tenant the benefit of any doubt that there could be. The condition is far from satisfactory. The authority ought not to impose a permanent fetter on a house without a careful consideration of its nature and careful consideration of how and when it should be removed or altered if changed circumstances make its removal or alteration just. It is only after some doubt that I have arrived at the view that the condition itself is not so unsatisfactory that it can be said to fulfil no town planning purpose, and thereby to supply evidence that the authority did not take the proper matters into account. I think that this condition, looked at broadly, could on the whole be said to contribute to the maintenance of a green belt in the area. The cottages are small and in rural surroundings. The exclusion of many urban classes of population will tend in general towards limiting their occupation to rural persons who make them a permanent and not a week-end home. The persons who make their homes there are more likely to be people who are working than people who have retired, since, in general, the former exceed the latter in number. People who are working are more likely to be working locally since the occupants will tend to be persons of small means. In the main this condition does make the cottages available to people who may need to live in the country, and does exclude many of the community who do not have to live in the country.

Mr. Megarry further argues that the Act confers no power to impose conditions restricting the persons, or classes of persons, who may use the property, but only a power to impose conditions restricting the purpose for which it is used. In my view, that argument certainly cannot be accepted in terms so broad. The Act itself contains no express words limiting the scope of the conditions; and I think that the legislature must be taken to envisage some restriction on the persons occupying premises, since that itself is often the only means of restricting the purpose, e.g., a farm cottage restricted to the farm hand or the bailiff, a building near a hospital restricted to the housing of nurses. Where, then, can one draw the line? It might be arguable that a restriction to a class of person fulfilling some office in relation to the adjoining land is the only permissible restriction. But that is a tenuous distinction, and I see no justification for inferring it. I think that restriction of persons is permissible if that restriction is of persons in relation to town planning, that is to say, if the restriction is genuinely directed to securing for a given locality a certain class of occupant from a town planning point of view. It is clear that such restrictions should be closely watched. For, if they are imposed from some housing or public health or social consideration other than town planning, the authority would be taking a wrong matter into account and the restriction would, on that ground, be invalid. (See *Pilling* v. *Abergele Urban District Council*.[16]) But in the case before us the restriction does not offend in that respect.

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[16] [1950] 1 K.B. 636; 66 T.L.R. (Pt. 1) 166; [1950] 1 All E.R. 76.

I cannot accept the further argument that the condition has spent its force after the first tenant has gone into occupation in accordance with it. The natural meaning of the words plainly restricts all future tenancies. There is no room for any implication that only the first tenancy is affected by them, and no ground on which such an implication could be justified.

I have come to the conclusion, not without some reluctance, that the appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for R. E. Millard, Aylesbury; A. L. Philips & Co.*

E. D.

In re WHITEHEAD'S WILL TRUSTS.
PUBLIC TRUSTEE *v.* WHITE AND OTHERS.

[1957 W. No. 3134.]

1959
March 12, 13, 19;
May 13.

Harman J.

Capital or Income—Administration of trust—Unit trust—Sub-units forming part of residuary estate—Distributions described as capital—Distinction between capital and income required by trust deed—Distinction made for tax purposes—Not wholly capital payments—Whether apportionable between capital and income interests.

A testatrix by her will empowered her trustees to retain any unauthorised trustee investments. Among the investments comprising her residuary estate were a number of sub-units in fixed investment trusts, the sub-units being a share of a unit which comprised various investments. Certain of the half-yearly distributions from the trusts were described as capital; the trust deeds required the warrants or cheques for payment to distinguish between capital and income, but did not recognise any equitable interests in the sub-unit. According to the explanations accompanying the payments most of the items so described arose from the sale of bonus shares, although others arose from some form of dividend payment. On a summons by the trustees to determine whether the so-called items were to be treated as capital or income for the purposes of the will of the testatrix:—

Held, that the provision in the trust deeds requiring the trusts to distinguish between capital and income were inserted merely for

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income tax purposes; and the trustees of the will were, notwithstanding those provisions, bound in any case of doubt to inquire into the source of each distribution which was labelled capital distribution, and to treat it as income or capital just as if they were the direct shareholders of the shares included in the sub-unit.

In re Doughty [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207 applied.

ADJOURNED SUMMONS.

The trustees of the will of Emma Whitehead, who died on July 15, 1947, took out this summons for the determination of the question whether certain sums included in periodical distributions from time to time received by them in respect of sub-units in fixed investment trusts for the time being comprised in her residuary estate and described as capital in the counterfoils attached to the relevant warrants for payment ought for the purposes of her will (a) to be treated wholly as income or (b) to be treated wholly as capital or (c) to be apportioned in some and what manner between capital and income of her residuary estate.

The following statement of facts is taken from the judgment: The testatrix by her will dated August 10, 1944, appointed the plaintiffs, the Public Trustee and another, executors and trustees and bequeathed to them her residuary estate upon the usual trusts for sale and conversion, and out of the proceeds to pay her debts and funeral and testamentary expenses and to invest the residue in authorised trust investments and to stand possessed of them and of all parts of her estate for the time being unsold upon trust to pay the income to her three nieces, the first three defendants, in equal shares, with remainders as to both capital and income upon their several deaths for other persons represented by the last three defendants.

By para. 6 the testatrix authorised her executors to retain "either temporarily or permanently all or any of the investments "standing in my name at my decease or which I may be then "possessed of or entitled to although such investments do not "come within the range of investments hereinbefore authorised." She made a codicil not relevant to the present question. Included in her property were 940 sub-units—Scottish Fixed Trust; 500 sub-units—"A" National Fixed Trust and 1,130 sub-units —"D" National Fixed Trust.

The plaintiffs sold 430 of the last mentioned, but retained the rest until paid off in the years 1953, 1954 and 1955. During the years of retention the plaintiffs received half-yearly payments from the managers of the trusts. Most of these payments were clearly income and were rightly so described; but sums amounting in the whole to £660 19s. 3d. were described by the payers as capital and have been provisionally retained by the plaintiffs, and it was in connection with these sums that the present question arose.

Investments in the fixed trusts were regulated by trust deeds. The first such deed regulating the Scottish Fixed Trust Unit was dated May 17 and 20, 1935, and was made between the National Fixed Investment Trust Ltd. (thereafter called the trust) and the Clydesdale Bank Ltd. described as the trustees. It recited the intention of the trust to transfer (as was done) into the name of the trustees or their nominees a group of investments particularised in the First Schedule thereto " with the intention that the " same shall constitute a unit as below defined and be held by the " trustees subject to the provisions of this deed."

Clause 1 of the deed was the definition clause, and provided that " first unit " meant the said group of investments subject to variation under the deed; " unit " meant a group of like investments; " unit investment " meant any one of the investments comprised in a unit; " sub-unit " meant " a share in a " unit entitling the owner to the beneficial interest in one-four " thousand eight hundredth part " of a unit; " cash produce " meant " all dividends, bonuses, and other sums whether capital " or income received by . . . the trustees in respect of a unit " or any unit investment in cash or by warrant, cheque or money " credit." " Specie produce " meant " all dividends, bonuses " and other sums whether capital or income received by . . . " the trustees in respect of a unit or any unit investment in " any shape or form other than " as aforesaid. " Trust period " meant 20 years from the date of the deed.

Clause 2 provided that the trustees were to stand possessed of each unit when received during the trust period upon the trusts declared by the deed but if during that time any investment should cease to pay dividends or for certain other reasons the trustees were bound on the trust's request to realise the investment and deal with its proceeds as if they were cash produce. Clause 3 provided for the issue by the trustees as required by the trust of certificates in favour of persons purchasing sub-units. Clause 4 provided that until sale sub-units should belong to the trust. Clause 7 provided that the trustees should during the trust period stand possessed of all cash produce and specie produce upon trust to procure the realisation of all specie produce and to convert the same into money and to distribute all cash produce and the proceeds of the realisation of all specie produce among the certificate holders according to their interests half yearly in June and December.

Clause 8 (b) provided: " In the event of any part of the amount " distributable being in respect of capital moneys the trustees " shall arrange that the cheque or warrant shall contain a statement to that effect and shall distinguish between the amounts " payable by way of capital and income respectively." Clause 8 (d) provided: " The trustees shall together with every cheque " or warrant as aforesaid issue a certificate . . . to the effect " that all income tax payable in respect of the amount distributed has been or will be duly paid. . . ." Clause 9 provided that if any of the unit investments should during the trust period be redeemed, either with or without an option to convert into some other investment, the trust might at its sole discretion call on the trustees either to accept the cash payment or exercise the option, and the cash received on any such repayment should be deemed " cash produce " but if the option were exercised the resulting investments should not be regarded as " specie produce."

Clause 15 (b) provided that the executors or administrators of a deceased certificate holder should be the only persons recognised by the trustees as having title to the sub-units comprised in such certificate. Clause 16 provided: " No person shall be " recognised by the trustees as holding or being entitled to the " benefit of any sub-unit upon any trust and the trustees shall " not . . . be bound by or required to recognise any equitable " or partial interest in any sub-unit or any other than an absolute " beneficial right. . . ."

Clause 19 dealt with the realisation and distribution of the units upon the expiration of the trust period and provided in particular that all cash produce and specie produce for the last six-monthly period should be distributed as though it were part of the proceeds of realisation of the units. Clause 31 contained a power of modification. Clause 34 contained an undertaking by the trustees to purchase sub-units at a certain price if called upon.

The power of modification was exercised by a supplemental deed of January 15 and 22, 1947, whereby a new clause was inserted obliging the trustees to send to a certificate holder half-yearly copies of audited accounts showing (a) the gross amount of the cash produce and specie produce per unit received during the period and the amount of income tax deducted by the trustees or before receipt by the trustees; (b) the cash produce and specie produce per unit received by the trustees as aforesaid free of and without deduction of income tax; and (c) the net amount proposed to be distributed per unit distinguishing between capital and income and indicating the source of such capital.

The National Fixed Trust Unit "A" was regulated by a trust deed of July 9, 1933, made between the National Fixed Investment Trust Ltd. and the Midland Bank Executor and Trustee Co. Ltd., and was on similar lines to the deed above recited. This unit contained 4,000 sub-units, and the trust period was 20 years from June 8, 1932. The half-yearly distribution dates were May and November. The deed did not require cheques or warrants to distinguish between capital and income, but did require that distinction to be shown in the half-yearly accounts.

The National Fixed Trust Unit "D" was regulated by a trust deed of July 16, 1934, made between the last-mentioned parties and was subsequently varied by two further deeds. The trust period was 20 years from July 16, 1934. Half-yearly distribution dates were January and July. The principal trust deed required cheques or warrants to distinguish between the capital and income distributed, but that provision was deleted by a modifying deed which required those details to be shown in the half-yearly accounts.

All those deeds were exhibited to the affidavit in support of the summons, which set out in detail the various payments by way of half-yearly distributions on each group of sub-units. It showed the total net sum received on each occasion and the portion (if any) of that sum declared in accordance with the provisions of the deed to be capital. Counterfoils to the warrants contained explanations of the so-called capital items; most of them arose from the realisation under the terms of the deed (by virtue of which they were defined as "specie produce") of bonus shares issued by the several companies whose shares figured in the portfolio of the unit. These realisations which converted specie produce into cash produce were distributed in accordance with clause 7 of the deed of 1935, and the trust in distinguishing between capital and income was acting under clause 8 (b) thereof. Distributions described as capital were not all proceeds of sale of bonus shares; for example, there was a special tax free dividend issued by the Imperial Continental Gas Association, and a sum described as "capital repayment" made by the same company.

There were also payments called "capital distributions" or "dividends" from the Staveley Coal and Iron Co. Distributions by the other two trusts were on similar lines.

E. I. Goulding for the trustees.

Mervyn Davies for persons interested in income. The testatrix has expressly authorised her trustees to retain any part of her estate which may, at her death, be invested in investments not being authorised trustee investments; and when she refers to the income of her residuary estate she must have intended to include the annual yield from any of these sub-units of which she died possessed. All distributions under the trust deed are impressed with the character of income payments, and on the authorities the testatrix is, in the absence of contrary intention expressed in her will, deemed to accept the provisions of the trust.

In *Bouch* v. *Sproule* [1] the House of Lords accepted the principle that where a testator permitted part of his estate to remain as shares in a company which had power to distribute its profits either as dividends or to convert them into capital, a valid exercise of that power was binding on all persons interested under the will in the shares, and what was paid by the company as dividend and capital went respectively to the tenant for life and remainderman. It was held in that case that a distribution of accumulated profits as part payment of a new issue of shares was intended by the company as an increase of its capital stock and, accordingly, should be treated as capital and not income. That case was applied in *Inland Revenue Commissioners* v. *Blott.*[2] There a testator had not expressly said anything about payments, and it was stated that the law would deem him to intend his disposition to apply according to whatever course was, in fact, taken by the company in which his estate had shares, and therefore, whatever the company prescribed—be it capital or income—should be accepted. Here the testatrix can have ascribed to her an adoption of the provisions of the trust deed as to the manner in which distributions received are to be applied. In *In re Speir,*[3] following those two decisions, it was said by Warrington L.J. that it was now well settled that it rested with the company to determine whether such resources should be distributed as income or retained as capital. In determining the question whether the company intended the payments to be capital, reference must be made to the substance and not merely to the form of the payments: *In re Taylor.*[4] The fact that the course adopted might be advantageous either to the tenant for life or the remainderman does not matter.

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[1] (1887) 12 App.Cas. 385.

[2] [1921] 2 A.C. 171; 37 T.L.R. 762.

[3] [1924] 1 Ch. 359.

The trust deed contemplates a clear distinction between the corpus of the sub-unit and its produce, and the trust deed imposes the character of income on all distributions. The description of some payments as capital is solely to show whether or not they are liable to tax and has no bearing on the present question of apportionment between tenant for life and remainderman.

It is possible to say that the investment trust deed insulates the trustees of the will from the company which pays out the actual dividends, and that the will trustees are required by the trust deed to treat the distributions as income; the law will ascribe an intention to carry out what is in the deed.

In *In re Despard,*[5] which was distinguished on its facts from *Bouch* v. *Sproule,*[6] it was held that the special dividend was income because the company gave the shareholder an option whether or not to receive it as income. See also *In re Northage.*[7]

The submissions can be thus summarised: (1) The payments are to be treated as income payments because, whether or not the sums are impressed with that character by the paying company, the trust deed provides for them to be income, and there is nothing in the will to show that the testatrix did not intend them to be income. (2) The evidence does not show that any of the payments were capitalisations effected by the companies concerned.

T. L. Dewhurst for persons interested in capital. All these payments are capital and should be so treated because they have been impressed with that character by the trust. If that were not so, there would have to be not so much an apportionment but an inquiry into the source of each payment.

The whole point of these unit trusts is to provide not only income but capital appreciation. There is nothing in the directions for distribution in the deed which would make the payments income, and what makes them capital is that the unit trust has in the accounts shown them as capital, the provision of the deed making it obligatory for the accounts to show the distinction between capital and income.

Bouch v. *Sproule*[8] was relied on to show that the payments

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[4] [1926] Ch. 923.

[5] (1901) 17 T.L.R. 478.

[6] 12 App.Cas. 385.

[7] (1891) 60 L.J.Ch. 488.

[8] 12 App.Cas. 385.

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there were intended by the company to be income, but the company there was not a unit trust and the present considerations did not arise. This is more like a casual profit as in *In re Pyke*,[9] although that case was not dealing with stock but with leasehold property.

Here the trustees of the unit trust deed have themselves impressed these particular payments with the nature of capital, by the distinction in the accounts and the whole nature of the unit trust itself. These payments, therefore, whatever their source from companies concerned, are purely capital and nothing else. The whole intention of the unit trust is that there should be a definite distinction between capital and income, and that is important for the purposes of publicity and inducing people to subscribe.

The unit trustees having impressed these payments with the nature of capital payments, there is a curtain between the trustees of the will and the management of the unit trust. Because of that curtain the court is not bound by the decision in *Hill* v. *Permanent Trustee Co. of New South Wales Ltd.*[10] to hold that payments by a company which is a going concern and not being by way of reduction of capital are income, and there is no reason why a capital profits distribution which would normally be regarded as income should not be treated by the unit trust as capital, since it is only because of an artificial rule that it is treated as income.

The first argument depends on the assumption that a curtain is raised between the trustees of the will and the management of the trust deed; the alternative submission is that a possible view is that no curtain exists at all, and the nature of the payments received are not altered at all in character: *Baker* v. *Archer-Shee.*[11] That case supports the proposition that the tenant for life is entitled to a fraction of the actual dividends on the shares comprised in the portfolio, and not merely to have the units administered by the trustees of the unit trusts. That is a difficult case to apply, but it is a decision of the House of Lords and is of general application. Anything effectively capitalised by the companies is capital, and anything not effectively capitalised is income. Looking at the deed, the character of the payments received by the trustees is capital, and it remains capital, there being nothing in the will to contradict it. If the testatrix had been asked what she meant by " income " from the sub-unit, she

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[9] [1912] 1 Ch. 770.

[10] [1930] A.C. 720.

[11] [1927] A.C. 844; 43 T.L.R. 758.

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would have said the annual produce from the sub-unit, and if she was then asked about other payments, she would have said that those were capital, they were her capital profits, they might not occur every year.

Mervyn Davies in reply on the cases. The speeches in *Baker* v. *Archer-Shee* [12] ought not to be regarded as material in this case; they merely show the right of the life tenants to claim dividends: here we have the sub-unit holder interested in the sub-unit according to the complicated rights contained in the trust deed. The right of such holders is to have the payments from the sub-unit as a whole made to them—not a direct right in different shares comprising the sub-unit. They have the right to request the managers to buy the unit back according to the Stock Exchange values, with a small deduction for management expenses.

Cur. adv. vult.

May 13. HARMAN J. read the following judgment: The late Emma Whitehead left included in her estate property of a comparatively novel kind, namely, certain sub-units in three fixed trusts. These her trustees retained during their currency and thus became possessed of what I may call the produce of the sub-units. The problem is that of the allocation of this produce to the beneficiaries under the will, whether interested in capital or income of the estate, and this seems to be a novel question in these courts, and one which may become of increasing importance, as this form of investment, or something like it, seems to be the fashion of the day. [His Lordship stated the facts as set out above and continued:]

It is at once evident that here is a new type of investment raising thorny questions for trustee recipients charged with the duty of holding the balance true between the conflicting interests of beneficiaries under a will or settlement, some entitled to income and some to corpus. It is true that trustees holding investments in limited companies face similar problems, but these have long been familiar and are regulated by well-known authorities, but a sub-unit is not, directly at any rate, such an investment. Unit trusts are not controlled by the shackles of the Companies Act, 1948. Within the wide limits set by the trust deed the managers may retain income receipts as capital or distribute capital receipts as income at their will. The use of the word "produce" underlines this freedom.

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[12] [1927] A.C. 844.

The trusts are, by their charters, not bound or, indeed, entitled to look beyond the registered holder of each sub-unit. It does not matter to them whether that holder be the absolute owner or a mere trustee or a partial owner. When he is, in fact, the absolute beneficial owner he can, of course, deal with sums realised as he chooses. It was argued that the object of the provisions requiring the trust to make distinction between capital and income must have been for the convenience of sub-unit holders so as to show them which distribution had suffered deduction of tax or was liable to it, and which was regarded from an income tax point of view as not subject to tax. When, however, a trustee is the registered holder he must consider the rights on the one hand of life beneficiaries and, on the other, of remaindermen.

Three views are possible. First, that the whole of the "produce" ought to be treated as income; secondly, that all so-called capital sums should be treated as capital; and, thirdly, that the trustees must inquire, just as trustees holding directly the shares which form the portfolio of a unit must do, whether the sum received is in truth capital like a bonus share, or income like a dividend paid out of capital profits. The difficulty of the last course would seem to be that owners of sub-units are not directly interested in the companies whose shares make up the portfolio and, therefore, have no right to make the inquiries to which a shareholder is entitled. No doubt the trusts themselves being the shareholders can make these inquiries, but I see nothing to oblige them to do so, and they might well decline to add to their duties.

The argument that all realisations shall be treated as income may, I think, be stated thus. The testatrix held these sub-units: she authorised her trustees to retain them as investments: she must, therefore, be supposed to have intended that her beneficiaries should enjoy the investments as they found them, that is to say, subject to the provisions of the trust deeds, as to converting specie produce into cash produce, and deputing to the trusts the right to decide what to distribute as income and what to treat as part of the capital of the sub-unit. It was submitted by Mr. Mervyn Davies that the provisions of the trust deed impressed on every distribution the character of income, and that there is nothing in the will to contradict this. There is, however, I observe, no provision in the will excluding the rule in *Howe* v. *Lord Dartmouth*.[1] This view, if right, will have resulted in the present case in a considerable portion of the original corpus of the unit finding its way into the hands of income beneficiaries in the form of proceeds of bonus shares which, in the case of an ordinary trust, rank as capital. Even more striking results might ensue if, under clause 9 of the recited deed, the trust should direct the proceeds of redemption of a unit investment to be received in cash, for it would then be distributed as cash produce. On the other hand, the trust might elect to exercise an option to convert, with the result that the investment received would then remain corpus, thus affecting the beneficial interests in a way over which the beneficiaries had no control.

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[1] (1802) 7 Ves. 137.

The contrary view would have the opposite effect, for it would convert into capital certain payments, which, if the will trustees were direct holders of the shares in question, would be distributable as income; for ever since the decision of Lord Russell in *Hill* v. *Permanent Trustee Company of New South Wales Ltd.*,[2] distributions by a company still a going concern and not being by way of reduction of capital remain income and are only distributable as such. This is subject to the modification, which is not relevant here, noted in *In re Duff's Settlement.*[3] There were some startling illustrations of *Hill's* case[4] during the tenure of office by the Labour Government (when nationalisation was the order of the day), notably in the case of holdings in Thos. Tilling & Co., a large part of whose business was compulsorily acquired by the Crown under the Transport Act, 1947, in exchange for Government stock. The firm continued in existence and distributed the stock among its shareholders: this was held to be income in the hands of trustees: see *In re Sechiari.*[5]

My attention was directed to a decision of Tomlin J. in *In re Taylor*,[6] where he says that it is the intention of the distributing company that controls the result. In this, he followed similar opinions expressed in *Bouch* v. *Sproule*[7] and *Inland Revenue Commissioners* v. *Blott.*[8] In the present case, the distributing companies are those included in the unit portfolio and the trust accordingly received the shares or cash impressed with the character to which their intentions pointed. Is this process to be repeated when the trust carrying into effect the terms of the trust deed made distributions to the holders of sub-units? I do not think there is any authority on this point, but will assume the answer to be affirmative.

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[2] [1930] A.C. 720.

[3] [1951] Ch. 721; [1951] 1 T.L.R. 735; [1951] 1 All E.R. 869; affirmed [1951] Ch. 923; [1951] 2 T.L.R. 474; [1951] 2 All E.R. 534.

[4] [1930] A.C. 720.

[5] (1950) 66 T.L.R. (Pt. 1) 531; [1950] 1 All E.R. 417.

[6] [1926] Ch. 923.

[7] (1887) 12 App.Cas. 385.

[8] [1921] 2 A.C. 171; 37 T.L.R. 762.

Looking, then, at the trust deed, do I find that it directs the trust to alter the nature of the money or securities received? I think not. It is true that they are directed to distribute everything received as "produce" of the shares in the portfolio and distribute it as cash, but I do not think that in this deed "produce" is synonymous with income. It is no doubt aptly described as the "yield" of those shares, in the sense that it is the holding of them that is the source of the distribution, but that is true of a bonus share issued on a capitalisation of profits which has always been treated as capital: see *Blott's* case.[9]

It was further argued that the testatrix who was the owner of the sub-units ought to be taken to have agreed to abide by the decision of the trust as to what part of their yield was capital and what income, and that having authorised her trustees to retain the sub-units she had put them in a like position. As I have already observed, the trust was forbidden to look beyond the registered holder of a sub-unit. He or she could of course if absolutely entitled treat the yield in his or her hands as a capital or an income receipt. I come to the conclusion that the provisions in the trust deeds requiring the trust to distinguish between capital and income were merely inserted for income tax purposes in an effort to ensure that the portions described as capital should not be treated in the recipient's hands as subject to income tax. The case may be considered as analogous to *In re Doughty*[10] where the headnote reads[11]: "It was provided by the articles of association of a limited company that '. . . the company in general 'meeting of the directors . . . may . . . pass a resolution . . . 'that any surplus capital moneys or capital profits in the 'hands of the company whether arising from the realisation 'of capital assets . . . or received in respect of any capital 'assets . . . shall be divided among the members of the company by way of capital distribution in proportion to their 'rights.'"

"*Held*, that the article, on its true construction, merely authorised distribution of capital profits, and did not purport to fix their character as between tenant for life and remaindermen; and that accordingly the sums received by the executors must be treated as income and paid to the tenant for life."

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[9] [1921] 2 A.C. 171.

[10] [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207.

[11] [1947] Ch. 263.

Cohen L.J., delivering the first judgment, cites this passage from *Hill's* case [12, 13]: " ' (1) A limited company when it parts " ' with moneys available for distribution among its shareholders " ' is not concerned with the fate of those moneys in the hands " ' of any shareholder. The company does not know and does " ' not care whether a shareholder is a trustee of his shares or " ' not. It is of no concern to a company which is parting " ' with moneys to a shareholder whether that shareholder (if " ' he be a trustee) will hold them as trustee for A absolutely " ' or as trustee for A for life only. (2) A limited company not " ' in liquidation can make no payment by way of return of " ' capital to its shareholders except as a step in an authorised " ' reduction of capital. Any other payment made by it by " ' means of which it parts with moneys to its shareholders must " ' and can only be made by way of dividing profits. Whether " ' the payment is called " dividend " or " bonus," or any other " ' name, it still must remain a payment on division of profits. " ' (3) Moneys so paid to a shareholder will (if he be a trustee) " ' prima facie belong to the person beneficially entitled to the " ' income of the trust estate.' " Cohen L.J. then goes on after expressing agreement with these principles [14]: " It seems " to me that, on its true construction, the article which we have " to consider, and the resolution passed thereunder, merely " authorise distribution of capital profits in such a way as, if " possible, not to attract income tax, and do not purport to deal " with the question of their character as between tenant for life " and remainderman."

So, here, it seems to me that the managers are not con-concerned with the character in which the sub-unit holders receive the cash produce twice yearly and have no intention of dictating to them, even if they could do so, whether, from any other point of view, the distribution were capital or income. Similar reasons appear to me to negative the argument that the decision of the trust to call some part of the yield capital impresses that part with a capital nature. I do not think there can be any authority directly in point. The will trustees must, in my judgment, notwithstanding the provisions of the trust deeds, which do not affect anything beyond the absolute rights of the registered holders, inquire in any case of doubt into the source of each distribution which is labelled a capital distribution and treat it as income or capital

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[12] [1930] A.C. 720, 730.

[13] [1947] Ch. 263, 270.

[14] Ibid. 271.

just as if they were the direct shareholders of the shares included in the portfolio.

There may be a difference in the case of the Imperial Continental Gas Association, which is a company limited or governed by a private Act of Parliament, and different considerations could arise there as against a company limited under the Companies Acts.

I declare that the sums referred to in the originating summons ought to be treated as income or capital for the purposes of the will of the testatrix according to the character in which such sums were respectively received by or on behalf of the trustees of the Fixed Investment Trusts.

Declaration accordingly: costs to be paid out of the entirety of the corpus fund.

Solicitors: *Gardiner & Co. for D'Angibau & Malim, Boscombe; Donovan J. Smalley & Co.; D. J. Hall, Ilford, Essex.*

I. G. R. M.

C. A.

1959
Feb. 9, 10, 11, 12, 13; *Mar.* 23.

Jenkins, Romer and Ormerod L.JJ.

GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

[1956 G. 2126.]

Landlord and Tenant—Repairs—Covenant—"Structural repairs of a "substantial nature"—Meaning of "structural repairs"—Meaning of "substantial"—Notice to landlords of disrepair—Disrepair due to failure of tenants' predecessors to repair—Liability of landlords—Long delay by landlords in complying with notice—Refusal of landlords to give specification of proposed repairs—Landlords' workmen prevented from doing repairs—Repairs done by tenants—Whether tenants entitled to damages.

By clause 2 (3) of a lease made in 1941 of a cinema the tenants covenanted to keep the demised premises "in good and substantial "repair and condition and properly decorated . . . but nothing in "this clause contained shall render the [tenants] liable for structural repairs of a substantial nature to the main walls roofs "foundations or main drains of the demised building." By clause 3 (2) the landlords covenanted, except so far as the tenants were liable under their covenants, to "repair maintain and keep the "main structure walls roofs and drains of the demised premises in "good structural repair and condition." On December 13, 1954, the lease was assigned to the plaintiffs (the tenants).

The roof being in disrepair and the cement rendering and brickwork of the front main elevation being defective, the tenants, on January 31, 1955, served a schedule of dilapidations on the landlords in respect of these. Long negotiations followed. The tenants contended that the roofs required reroofing at a cost of £961, the landlords, on the other hand, alleged that they had obtained a tender of £130 10s. for the work, and that £961 was excessive. The landlords further contended that the repairs were the liability of the tenants, being due to the failure of the tenants' predecessors in title to keep the premises in good repair in accordance with their repairing covenants. The tenants required the landlords to furnish their surveyor with a written specification of the repairs the landlords proposed to do. The landlords failed to do so but, after a long correspondence, on September 19, 1955, on their instructions, a builder with his men entered on the premises and started to repair the main roof. They were ordered off the premises by the tenants, who subsequently did the repairs themselves at a cost of £961 and in this action claimed damages for breach of the landlords' covenant to repair the roofs, and a declaration that the landlords were liable to repair the front elevation:—

Held, (1) that making good the rendering and brickwork of the front elevation were structural repairs of a substantial nature and fell within the landlords' covenant to repair.

(2) That the repairs to the roof also fell within the landlords' covenant.

(3) That an assignee of a term is not liable for particular breaches of a tenant's repairing covenants committed by his predecessor, though he is liable for the disrepair of the premises as they stand when he takes over so far as their then state of disrepair falls within the scope of the tenant's repairing covenants; but that particular breaches committed before the assignment to him, as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned; and that, in the short time which elapsed between the assignment of the premises to the plaintiffs and the service of the notice of dilapidations, no appreciable part of the disrepair could be attributed to breach of the lessees' covenant by the plaintiffs as tenants; accordingly, the accumulated breaches of the lessees' repairing covenants, which had resulted in the need for "structural repairs of a substantial "nature," could not be set off against the claim against the landlords for breach of covenant.

(4) (Jenkins L.J. dissenting), that, assuming that the repairs which the landlords proposed to do to the main roof would have constituted a sufficient performance of their covenant under clause 3 (2) of the lease, the landlords had, on the facts, given to the tenants a sufficient warning of their intention to do the repairs, and of the nature of the work they proposed to do, and that the tenants having prevented the landlords from doing the work, the landlords were not in breach of their repairing covenants in regard to the roof and the

GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

tenants had no cause of action in respect of the landlords' failure to repair the roof.

(5) That the case must be remitted back to the trial judge to determine whether the landlords' proposed repairs would have, if completed, have complied with the landlords' repairing covenant.

Decision of Vaisey J. [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551 varied.

APPEAL from Vaisey J.[1]

By a lease dated June 12, 1941, the Century Cinema at Leytonstone, Essex, was demised by the predecessors in title of the defendants to the predecessors in title of the plaintiffs. By clause 2 (3) of the lease the tenants covenanted: "To keep the "demised premises and the sanitary and water apparatus and all "additions and improvements thereto in good and substantial "repair and condition and properly decorated and in a state in "every respect fit for cinematograph entertainments but nothing "in this clause contained shall render the lessee liable for structural repairs of a substantial nature to the main walls roofs "foundations or main drains of the demised building." By clause 3 (2) the landlords covenanted "To (except so far as the "lessee is liable under the lessee's covenants hereinbefore "contained) repair maintain and keep the main structure walls "roofs and drains of the demised premises in good structural "repair and condition at all times during the said term."

By an assignment of December 13, 1954, the lease became vested in the plaintiffs, Granada Theatres Ltd. (hereinafter called "the tenants"). On January 31, 1955, they served a schedule of dilapidations on the defendants, Freehold Investment (Leytonstone) Ltd., the then owners of the reversion (hereinafter called "the landlords"), requiring them to repair the roofs and the front elevation of the cinema, from which the cement rendering was breaking away. A long correspondence followed between the parties. The landlords at first repudiated all liability, but at a later stage (as their Lordships held) they agreed to do repairs. It appeared from that correspondence that one Coles, who was the architect acting for the tenants, contended that the whole auditorium roof needed stripping and reroofing, none of the old slates being worth re-using. He also contended that the smaller roof at the rear of the premises required re-covering with asbestos. The tenants' builders' estimate for this work was £807 for the auditorium roof and £154 for the rear roof, making £961 in all. One Rusha, who was the architect for the landlords, did not agree with Coles. Rusha advised the landlords that the auditorium roof did not require stripping. He considered that the matter could be dealt with by the roof being overhauled, broken and cracked slates being replaced and refixed where they had slipped. He obtained an estimate from one Tidey, a builder, for this work. Tidey's estimate "to overhaul and renew cracked and broken slates "(approximately 351) refix all slipped slates and leave water-"tight" was £130 10s. This estimate only referred to the auditorium. The landlords did not obtain an estimate for the rear roof.

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[1] [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551.

In the correspondence which took place between the parties and their respective architects, the tenants' advisers repeatedly drew the landlords' attention to the fact that the auditorium had been redecorated and that the roof leaked when it rained. The tenants threatened to do the repairs themselves. In the course of this correspondence Coles, on behalf of the tenants, several times asked for detailed specifications of the work which the landlords proposed to do, and stated that no work must be done until he had sufficient information to satisfy him that the roof would be satisfactorily repaired, and that the times of working would be acceptable to the management of the cinema. No specifications were supplied by the landlords, nor did they disclose Tidey's estimate before the proceedings commenced.

On September 14 Rusha wrote to Coles that his contractors would be commencing work on the roof early the next week. On September 19 Tidey sent his men to the cinema and they began the work of repair on the roof on the landlords' behalf. On the instructions of one Bernstein, the tenants' managing director, they were ordered off the premises and not allowed to continue the repairs. The parties' architects were by this time at loggerheads and failed to reach any agreement. The tenants did the work of repair themselves.

In this action the tenants sought to recover £961 as damages for breach by the landlords of their covenant to repair the roofs, and a declaration that on the true construction of the lease the repairs to the front elevation of the cinema were the responsibility of the landlords.

The landlords contended: (1) that some of the roof repairs were not, and that none of the front elevation repairs were, repairs within the landlords' covenant in clause 3 (2) of the lease; (2) that such of the roof repairs as fell within clause 3 (2) were not necessary in order to repair, maintain and keep the main structure, walls, roofs and drains of the cinema in good structural repair and condition; (3) alternatively, that such of the roof repairs and of the front elevation repairs as were repairs within clause 3 (2) had become such repairs by reason of the neglect or failure of the tenants to carry out from time to time, as and when necessary, such repairs as ought to have been carried out by the tenants under clause 2 (3) of the lease, for an assignee was not relieved of liability merely because the premises had become out of repair before he took his assignment; (4) that they were not liable for the cost of the repairs carried out to the roof by the tenants; and (5) that their refusal to carry out repairs to the front elevation was not a breach of their obligations under clause 3 (2).

The tenants replied, inter alia, that even if individual items of disrepair occurring before the assignment to them had been the liability of the then tenants and not the landlords, at the time of the assignment these items had become "of a substantial "nature." At the first moment when the tenants became liable at all on the covenants of the lease, the repairs in question had accordingly ceased to fall within the tenants' covenant and fell within the landlords' covenant. The landlords might have a claim for indemnity against those in whom the lease was previously vested, but that could not affect the present tenants. Even if an assignee was liable to make good disrepair existing at the time of the assignment to him, this could be so only if the items of disrepair then fell within the tenants' repairing covenant. An assignee was not vicariously liable for breaches of covenant by his predecessors in title.

Vaisey J. gave judgment for the tenants, holding that the repairs both to the roofs and the front elevation of the premises were structural repairs of a substantial nature. He, however, held, as the evidence of the cost of effecting the repairs was unsatisfactory, that there must be an inquiry as to damages.

The landlords appealed.

H. Heathcote-Williams Q.C. and *John Vinelott* for the landlords. Repair of the defects in the cement rendering of the front wall is not a "structural" repair for which the landlords are liable. The rendering is not a part of the structure but an application to the structure, like paint. [Reference was made to Woodfall on Landlord and Tenant, 25th ed., p. 770.] The landlords do not contend that the slates are not part of the roof or that these repairs were not substantial, but they do submit that it is not open to the tenants to neglect to do the repairs for which they are liable under their covenant and then, when their failure to repair has resulted in the need for structural repairs to be done, to require the landlords to do the repairs in compliance with their covenant. These items of disrepair are the result over the years of the tenants' failure to comply with their own repairing covenant. The landlords may have been foolish in not insisting on their rights in the past, but that should not be allowed to prejudice them today. It would not now be equitable to make the declaration for which the plaintiffs ask: *Guaranty Trust Co. of New York* v. *Hannay & Co.*[2]

John Vinelott following. The landlords are not liable to pay to the tenants the costs of executing these repairs to the roof, because the landlords were themselves ready and willing to do the repairs. For a landlord to be liable he must both have notice of the disrepair and refuse or fail to do the necessary repairs. It is conceded that the landlords had notice of the disrepair. It is also conceded: (a) that a landlord must give reasonable notice of his intention to enter and repair, and that he must carry out the repairs with reasonable diligence, causing as little inconvenience as possible to his tenant, and (b) that the tenant is entitled to know, in general terms, what the landlord proposes to do. Here the evidence shows that the landlords did give to the tenants adequate information of what they proposed to do. The onus is on the tenants to prove that what the landlords proposed would not have been a proper compliance with their covenants. This cinema was a building of poor quality. The extent of the landlords' obligation must be considered having regard to the nature of the building. The tenants never considered whether this roof could have been repaired so as to make it an adequate, sound roof. They required a new roof. The onus is on them to show that the roof was incapable of repair.

R. E. Megarry Q.C. and *Oliver Lodge* for the tenants. The decision in *Chapman* v. *Michaelson*[3] disposes of the landlords' point that it would not be equitable to make a declaration. A declaration is not a claim for equitable relief.

As to the landlords' first point—that the disrepair is the result of the accumulation of a number of small matters for which the tenants are liable under the lease—the plaintiffs, the present tenants, took an assignment of the premises on December 13, 1954; they then for the first time became bound to the landlords by reason of privity of estate; it is necessary to take the physical state of the property at that date. Anything then within the ambit of the tenants' repairing covenants became the plaintiffs' liability. Repairs which at that date had become repairs of a structural nature were excepted from their liability. On December 13, 1954, the landlords probably had substantial claims against the previous tenants for failure to effect a mass of minor repairs. That does not affect the liability of the present plaintiffs. The landlords have not pleaded that the plaintiffs were liable for the wants of repair of their predecessors. If there had been the same landlords and the same tenants throughout, the position would have been simple. But both the landlords and the tenants have changed. So far as the present tenants are concerned, at all material times these repairs have been structural repairs of a substantial nature. An assignee of a lease is liable only for breaches which occur while the term is vested in him, or for continuing breaches which continue into his time; he is not liable for breaches by his predecessor which, at the time of the assignment, have become the liability of the landlord and not of the tenant, even if the landlord could previously have sued the then tenant in respect of part or all of the defects. There is no vicarious liability of an assignee for his predecessor's breaches: *Grescot* v. *Green.*[4]

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[2] [1915] 2 K.B. 536.

[3] [1909] 1 Ch. 238; 25 T.L.R. 101.

As to the landlords' second point—that they were always ready and willing to do these repairs—while there is nothing in the lease authorising the landlords to enter and do the repairs, they have a right of entry by necessary implication to do the repairs in a reasonable way: *Saner* v. *Bilton.*[5] However, since this is not an express contractual right but arises by implication, it will also be implied that the right must be exercised in a reasonable way. The tenants suffer all the inconvenience of work of repair being done on the premises, and will suffer further if the repairs are inadequate in scope or execution. The tenants are accordingly entitled to know, before letting the landlords enter to do the required work, what the landlords propose to do, together with details of the proposed works. Even if a tenant is not entitled to detailed specifications, he must at least be entitled to have all the information in his landlord's possession with regard to the proposed works. Until his landlord gives such information a tenant can refuse access to the premises. Here, on the facts, the landlords were never ready and willing to do the repairs. The tenants were justified in refusing to allow the landlords to remain on the premises to do the repairs since, having no information as to what was to be done, the tenants could not know whether the proposed works would be adequate. Here the landlords had covenanted to repair and the tenants were entitled to know in advance how the landlords proposed to comply with their covenants. [Reference was made to *Lurcott* v. *Wakley and Wheeler.*[6]]

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[4] (1700) 1 Salk. 199.

[5] (1878) 7 Ch.D. 815.

The landlords' third contention was that the repairs to the roof and front elevation were not "structural repairs of a substantial nature." On the facts, the repairs required to the front elevation were structural and of a substantial nature. The rendering, which was defective, was required to keep out the weather. It was part of the wall. On the footing that the landlords' scheme of repairs to the roof would have been adequate, they were of a "substantial" nature. [Reference was made to *Palser* v. *Grinling.*[7]] It is not disputed that the repairs to the roof were structural. The lease was the landlords' lease and the rule contra proferentem should be applied in construing it.

The question is: What damages are the tenants entitled to recover? The landlords submit that, if their proposals for doing the work were adequate, they are not liable to pay any damages to the tenants at all, since they were not in breach of their covenant. This would mean that a landlord could escape all liability for repairs if he gave the tenant information which the tenant thought inadequate but the court ultimately held to be just sufficient. It would be wrong to put a tenant into such a position of difficulty and peril merely because he requires information, especially where that information is in the landlord's possession and could easily have been given. There appear to be three possible bases for assessing the damages: (1) The sum of £130, which the landlords say was the proper cost of doing the work; (2) the sums the tenants actually spent on the work; or (3) some other sum calculated on some other basis of assessment. [*Hewitt* v. *Rowlands* [8] referred to.] It is contended that the landlords are liable to pay the proper cost of doing the repairs.

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[6] [1911] 1 K.B. 905.

[7] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.

[8] (1924) 131 L.T. 757.

Oliver Lodge following. The landlords at no stage in the negotiations stated that they were willing to do these repairs. The tenants were justified, on the facts, in requiring evidence of what the landlords proposed to do. [Reference was made to *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[9]]

John Vinelott in reply. With regard to the front elevation, it is submitted that there was no jurisdiction to make a declaration. The landlords' case is that this rendering is not part of the structure but performs a decorative function. It resembles for this purpose paint. It is not an essential part of the building.

The tenants' predecessors in title were responsible for maintaining the premises in proper condition, and the tenants are now estopped from relying on the failure of their predecessors in title: *Taylor* v. *Needham*.[10] The tenants' predecessors could not have sued the landlords in respect of these wants of repair, and the tenants are bound by the estoppel binding their predecessors.

On the assumption that the landlords' proposed scheme of repair was a compliance with their covenant, they gave to the tenants reasonable notice of their intention to do the work, and the tenants were not entitled to any further information as to the landlords' proposals. On the facts, the landlords were at all times ready and willing to do the repairs to comply with their covenant and are not in breach of it.

March 23. The following judgments were read.

JENKINS L.J. This is an appeal by the defendants, Freehold Investment (Leytonstone) Ltd., from a judgment of Vaisey J., dated June 13, 1958, in an action brought against them by the plaintiffs, the Granada Theatres Ltd., concerning the liability of the landlords under a landlord's repairing covenant contained in a lease dated June 12, 1941, by the landlords' predecessors in title to the tenants' predecessors in title, of the premises known as the Century (formerly the Academy) Cinema, 350A, High Road, Leytonstone. The lease was for a term of 21 years from June 2, 1941, at a rent of £750 per annum, subject to increase. The term was assigned to the tenants on December

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[9] [1957] 1 Ch. 67; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1, C.A.; reversing [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497; affirmed H.L. [1959] A.C. 2; [1958] 2 W.L.R. 573; [1959] 1 All E.R. 607.

[10] (1810) 2 Taunt. 278.

13, 1954. The landlords' repairing covenant is drawn by reference to a repairing covenant by the lessee, which is in these terms. It is No. 3 in the fasciculus of lessee's covenants contained in clause 2 of the lease: "The lessee for itself and its assigns and "to the intent that the obligations may continue throughout the "term hereby created covenants with the lessors as follows. . . . "(3) To keep the demised premises and the sanitary and water "apparatus and all additions and improvements thereto in good "and substantial repair and condition and properly decorated "and in a state in every respect fit for cinematograph entertain"ments but nothing in this clause contained shall render the "lessee liable for structural repairs of a substantial nature to the "main walls roofs foundations or main drains of the demised "building." The landlords' repairing covenant is in these terms —it is No. 2 in the fasciculus of landlords' covenants contained in clause 3 of the lease: "(2) To (except so far as the lessee is "liable under the lessee's covenants hereinbefore contained) re"pair maintain and keep the main structure walls roofs and "drains of the demised premises in good structural repair and "condition at all times during the said term."

The effect of this covenant, read in conjunction with the lessee's repairing covenant, appears to be that the landlords are liable under it for structural repairs of a substantial nature to the main walls, roof, foundations or main drains of the demised building; whereas the tenants are liable under the lessee's repairing covenant for all repairs not falling within that description. This follows, I think, from the exclusion from the landlords' repairing covenant of repairs "for which the lessee is liable under "the lessees' covenants hereinbefore contained," coupled with the obligation cast on the lessee by the lessee's repairing covenant to do all repairs, with the exception of structural repairs of a substantial nature to the main walls, roof, etc.

The questions in the case are in substance: (a) whether certain works of repair done or needing to be done: (i) to the main roof (formerly slated) and smaller back roof (at all material times covered with asbestos sheeting) of the auditorium of the cinema; and (ii) to the front elevation (consisting of a 9-inch brick wall rendered with cement) of the demised premises, or any, and if so which, of these works, are repairs of the description for which the landlords are liable upon the true construction of these ill-drawn covenants; and (b) if so, whether the tenants have lost, or are precluded from asserting, their rights in respect thereof on one or other of the grounds relied on by the defendants, to which I will later refer.

To anticipate matters, it appears that, after a protracted dispute, the tenants themselves carried out the work on the auditorium roofs which they considered to be necessary in order to put the roofs in the state of repair demanded of the landlords under their repairing covenant. Having carried out this work, the tenants began the present action, in which they claimed (to put it shortly) (1) £961 as damages for the cost incurred by the tenants in executing the roof repairs, and (2) a declaration that upon the true construction of the lease the repairs to the front elevation of the cinema were the liability of the landlords.

By the order under appeal (again putting it shortly) the judge made declarations in favour of the tenants to the effect that, upon the true construction of the lease, the repairs to the roof of the cinema and the repairs to the front elevation of the cinema required by items 84 and 85 of the schedule of dilapidations, referred to in paragraph 13 of the statement of claim, and set out in the schedule to the order, were the liability of the landlords, and ordered an inquiry what damages had been sustained by the tenants by reason of their having carried out the repairs to the roof. In reaching the conclusions to which the order gave effect, the judge held that all the repairs in question were structural repairs of a substantial nature and, as such, within the scope of the landlords' repairing covenant. He also rejected an argument advanced on the landlords' side to the effect that, even if the repairs in question were in cumulo structural repairs of a substantial nature, they were no more than the accumulated product of individual wants of repair, each of which considered separately ought to have been remedied by the tenants under the lessees' repairing covenants, and that the landlords, accordingly, had a claim against the tenants in respect of these individual breaches sufficient to wipe out the tenants' claim against them under the landlords' repairing covenant. The judge refrained from deciding whether this contention could be supported in principle, rejecting it on the ground that in the present case the tenants only acquired the term on December 13, 1954, and served their schedule of dilapidations on January 31, 1955; the inference being that, in his view, there could not, during that short period, have been any material contribution by the tenants to the accumulated disrepair. A further point taken on the landlords' side, which loomed large in the argument before us, and which, no doubt, was ventilated before the judge, and must inferentially be taken as having been rejected by him, although he did not expressly deal with it, was to the effect that the tenants had forfeited any claim they might otherwise have had in respect of the roof repairs because the landlords had at all material times been ready and willing to do the necessary repairs, but the tenants had prevented the landlords from doing such repairs by refusing to allow the landlords access to the premises for that purpose, and ultimately doing the repairs themselves. There is one small question of fact which appears to have been misapprehended by the judge. In his judgment he attributes the £961 wholly to the cost of repairing the main roof of the auditorium, whereas, in fact, it was made up of £807 for the main roof and £154 for the rear roof, both roofs, and not the main one only, having been repaired by the tenants themselves before action brought.

I must now refer to the history of the dispute, and in view of the point taken on the landlords' side, to the effect that the tenants in any case disqualified themselves from relief in respect of the roof repairs by wrongfully preventing the landlords from doing those repairs, and ultimately doing them themselves, it must, I fear, be referred to in some detail. It will be best appreciated through the correspondence, to which I will next turn.

[His Lordship read the correspondence and continued:] As appears from what I have already said, the judge construed the landlords' repairing covenant in the same way as I do, that is to say, as extending to " structural repairs of a substantial nature." As to the meaning of the expression " structural repairs " and the words " substantial " and " structure," the judge made these observations which I am content to adopt. He said [1]: " It " appears, rather surprisingly, that the expression ' structural " ' repairs ' has never been judicially defined, a fact to which " attention is drawn in Woodfall on Landlord and Tenant, 25th " ed., p. 770, para. 1732, and counsel in the present case have " accepted that statement as correct. The writer of the text-" book submits on the same page that ' structural repairs ' are " those which involve interference with, or alteration to, the " framework of the building, and I would myself say that " ' structural repairs ' means repairs of, or to, a structure. It is " sometimes said that repairs must always be either structural or " decorative, and if that is the simple criterion we are, in this " case, certainly not dealing with decorative repairs.

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[1] [1958] 1 W.L.R. 845, 848; [1958] 2 All E.R. 551.

"Next, what is meant by the words 'of a substantial nature'? In a South Australian case, *Terry's Motors* v. *Rinder*,[2] the word 'substantial' is pilloried as a word devoid of any fixed meaning, and as being an unsatisfactory medium for conveying the idea of some ascertainable proportion of a whole. In *Palser* v. *Grinling*,[3] a question arose as to what was a 'substantial 'portion' of a rent, and the decision is summarised (not perhaps very helpfully) in the headnote, saying that 'sub'stantial' does not mean 'unsubstantial,' but is equivalent to 'considerable,' and that the judge of fact must decide the matter according to circumstances in each case. See also *Thorneloe and Clarkson Ltd.* v. *Board of Trade*.[4] Again, what is a 'structure'? And what ought to be regarded as part of a structure? We are dealing here with (1) the roof, and (2) one of the main walls of a cinema, and surely those are parts of the structure of the building."

As to the specific items of disrepair upon which the dispute turns, I may deal first with the front elevation of the premises. The competing views are, on the one hand, that you have here a wall, which no doubt is part of the structure, coated with a cement rendering, which can be regarded for this purpose as equivalent to paint. The cement rendering is merely, one might say, decorative, perhaps to some extent protective, but is no more part of the structure than a coat of paint would be. On the other hand, it is said that the front elevation of the cinema consists not of a wall with the incidental application of cement rendering, but it consists of a 9-inch wall rendered in cement. The bricks and the cement should be taken together, and they together constitute the front elevation. In my view, the latter way of regarding this cement rendering and the wall behind it is correct. On the evidence as a whole, the proper conclusion appears to me to be that the cement rendering (which appears to have been from $\frac{3}{8}$ to $\frac{7}{8}$ inches in thickness) set up a chemical reaction in the bricks of the 9-inch wall, and that this chemical reaction, coupled with the effect of water seeping down between the rendering and the wall and the effects of frost, caused the bricks to deteriorate and the rendering to come away from the wall, taking with it a considerable proportion of the outer ends and sides of the bricks. Moreover, the rendering, where it had come loose from the wall, was liable to fall, and was thus a potential source of danger. The operations necessary to make good the frontage to the premises would, therefore, consist of removing the rendering, making good the defective brickwork, and replacing the rendering. These operations appear to me, as they did to the judge, to amount to structural repairs, and, moreover, in view of their extent, to amount to structural repairs of a substantial nature, and, therefore, these were repairs which fell to be included in the landlords' repairing covenant.

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[2] [1948] S.A.S.R. 167.

[3] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.

[4] (1950) 66 T.L.R. (Pt. 1) 1117; [1950] 2 All E.R. 245; [1950] W.N. 306.

I need not take time by going into the evidence, but my conclusions are amply supported, at all events, by the evidence, and I see no reason to differ from the judge on that item.

Next, as to the roofs, it appears to me that even the work recommended by Tidey, which, according to his estimate, involved the use of some 350 new slates but which, in fact, would have called for the provision or refixing of, I think, nearer 500 slates in all, if one allows for slipped slates and lost ones, would amount to a structural repair of a substantial nature. I do not think that a matter of 350 to 500 slates out of a total of 12,000 slates on a roof could be regarded as a mere trifle. The question, when one is dealing with such things as slates, is necessarily to some extent one of degree. It was put in the course of the argument that if a gale blew off two slates, for example, the work of replacing them could hardly be said to be a structural repair of a substantial nature. But obviously different considerations must apply if there were a hurricane stripping the house of all its slates, and I would add that, if somebody "bought blind" a house represented to be "structurally complete," and he went there and found the rafters with no slates on them, he could, I apprehend, complain with justification that his vendor had been guilty of misrepresentation. There are, of course, two ways of putting this. Mr. Heathcote-Williams, while admitting that a roof is a part of the structure and, accordingly, that repairs to the roof would be in the nature of repairs to the structure, says that in this case there is not enough substance in the structural aspect of the repairs. I think that fairly puts his position, and his reason for so submitting is that, although no doubt slates would have to be replaced and renewed, there would be no interference with the rafters or roof beams of the cinema; it would merely be a matter of replacing the protective skin or layer in the form of slates which formed part of the roof but which could be removed and replaced without interfering with the structure of the roof.

Paying the best attention I can to the arguments and the evidence, I see no sufficient reason here for differing from the view taken by the judge that the roof repairs also fell within the landlords' repairing covenant.

Then there was a point of a different nature taken in the course of the argument that it would be inequitable to make the order sought. That contention was abandoned by Mr. Vinelott, with the concurrence of Mr. Heathcote-Williams, and I need not say anything further about it.

Then there was the interesting point, to which I have already referred, to the effect that these dilapidations did not occur overnight, but occurred, as it were, slate by slate, as slates got loose or fell off over the years, and inch by inch as the rain gradually seeped down the cement rendering or chemical reaction began to do its work. On this basis it is said that the alleged breaches of the landlords' repairing covenant are no more than an accumulation of individual breaches of the lessees' repairing covenant, and, consequently, that the tenants here cannot recover. It is said that, in view of their liability under their covenant for the individual wants of repair making up the totality of disrepair, they must be liable for the totality of disrepair made up of those individual items, and that can be expressed as a set-off or cross-claim for an amount sufficing to wipe out the claim under the landlords' covenant. It appears to me that this contention fails for a number of reasons. First, it is clear, in view of the very short time which elapsed between the assignment to the tenants and the service of the schedule of dilapidations, that no appreciable part of the disrepair could have been attributable to breaches of the lessees' covenant to repair committed by the plaintiffs as tenants themselves. It seems to me that this in itself is sufficient to dispose of the argument. An assignee of a term is not liable for particular breaches of tenant's repairing covenants committed by his predecessors. He is, of course, liable for the disrepair of the premises as they stand when he takes over, so far as their then state of disrepair falls within the scope of the tenant's repairing covenants, but particular breaches committed before the assignment to him, as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned. Over and above that, it is to be observed that this part of the landlords' case is pleaded so as to apply only to the acts of the tenants themselves and not of their predecessors in title, and it appears that, when it was sought to amend the defence by bringing in this point, the inclusion of a reference to the predecessors in title of the present tenants was expressly disallowed, the proposed amendment being objected to by the tenants.

Finally, it seems to me, if this point were otherwise sound, it could only operate by way of counterclaim; each side would have their claim to damages for breach of covenant, and if one of them wanted to pursue his claim after a claim had been made against him by the opposite party, I should have thought his proper course would have been to do so by an appropriate counterclaim in the action, and, as I understand it, there is no question of any such counterclaim here.

Those, I think, are all the points with which it is necessary to deal, except one. It does remain to consider with respect to the repairs to the main roof of the cinema, the landlords' contention to the effect that the landlords were, and had at all material times been, ready and willing to carry out the requisite repairs in accordance with the landlords' covenant in clause 3 (2) of the lease, but were prevented from doing so by the tenants.

On this aspect of the case we were invited by both parties to assume that the repairs to the main roof, which the landlords engaged their builder, Tidey, to carry out, would, if carried out, have constituted a sufficient performance by the landlords of their obligations under clause 3 (2) of the lease so far as this roof was concerned, and to decide whether, on that assumption, the tenants' conduct was such as to destroy their claim to damages under this head. This question turns almost entirely on the correspondence, to which I have already referred. Rusha, the landlords' architect, was cross-examined at considerable length on the correspondence, and he made it quite clear that he gave the tenants' architect, Coles, no particulars at all of the work the landlords intended to do on the main roof, apart from the last paragraph of his letter of July 7, 1955: " Subject to my client's " approval, I recommend that a reputable firm of builders should " be employed to overhaul both the roofs, replacing broken and " cracked slates and refixing where slipped." That statement clearly did not commit Rusha or the landlords to anything. Thereafter Rusha, acting on instructions, repeatedly either refused, or simply did not answer, Coles' request for information as to the work to be carried out, and the only information Coles ever got from Rusha as to the work proposed seems to have been that the roof was to be made " watertight."

As to the law to be applied to the facts emerging from the correspondence and from Rusha's evidence:

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Freehold Investment (Leytonstone) Ltd.

Jenkins L.J.

(1) It is well settled that a landlord's covenant to repair is a covenant to repair on notice.

(2) It is further well settled that under such a covenant the landlord has an implied licence to enter on the premises for the purpose of performing it (see *Saner* v. *Bilton*[5]).

(3) Where, as here, the covenant is to "keep" in repair, failure to perform it after notice constitutes a continuing breach in respect of which a fresh cause of action arises from day to day so long as the requisite repairs remain undone.

(4) In the event of the landlord failing to do the requisite repairs within a reasonable time after notice, the tenant is entitled to sue him in damages without first incurring expense by doing the repairs himself (*Hewitt* v. *Rowlands*[6]).

(5) The covenant is clearly not specifically enforceable, but I apprehend that, in the event of the landlord failing to do the repairs in a reasonable time, the tenant can, at his option, do the requisite repairs himself and claim the proper cost of so doing as damages flowing from the breach.

(6) If the landlord attempts within a reasonable time to do the work but is prevented from so doing by the tenant refusing him entry on the premises in accordance with the implied licence, the tenant cannot, I apprehend, maintain his action for damages so long as he persists in such refusal, because, in such circumstances, the landlord is not in breach of his covenant, or, at all events, has only been put in breach of it by the tenant's own conduct.

(7) The parties are under a duty to each other to act reasonably. It behoves the landlord, who is in breach of his covenant, to be diligent in the remedying of such breach. He is not entitled to keep the tenant waiting indefinitely and then complain if the tenant ultimately decides to do the work himself. On the other hand, he must be reasonable in the exercise of his licence to enter and (as I think) give the tenant sufficient notice of his intention to enter, and information as to the nature and extent of the work he proposes to carry out. On his part, the tenant must not unreasonably obstruct the landlord in the exercise of his right of entry for the purpose of doing the work, or take the matter out of the landlord's hands by doing the work himself before the landlord has had a reasonable opportunity of doing so.

In the present case the original "schedule of dilapidations and "wants of repair" enclosed in the tenant's letter of January 31,

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[5] (1878) 7 Ch.D. 815.

[6] (1924) 131 L.T. 757.

1955, to the landlords, seems, in the first instance, to have been wrongly addressed, but ultimately to have reached the landlords' solicitors by February 9, 1955. There is no doubt that it constituted a notice of disrepair for the purposes of the landlords' covenant. It was met on March 2, 1955, by a letter from the landlords' solicitors denying liability.

At this point it would, I apprehend, have been open to the tenants forthwith to treat the landlords as having repudiated their obligation under the covenant, and, without allowing any further time, either to bring their action for damages immediately without first doing the work themselves, or, at their option, to proceed at once to do the requisite work and sue the landlords for its proper cost as damages flowing from the breach. Neither of these courses was actually pursued by the tenants, but the fact that they were open to the tenants shows that, at this early stage of the correspondence, the tenants already had a complete cause of action.

[His Lordship reviewed the correspondence and continued:] In the end, the tenants resolved the deadlock by doing themselves the re-roofing in asbestos specified as an alternative to stripping and re-roofing in Coles' letter of June 7, 1955. That, as I have said, must, in view of the assumption we have been invited to adopt as to the sufficiency of Tidey's proposed work, be taken to have exceeded what was necessary to comply with the covenant. The landlords as reversioners have benefited by the tenants' work, and now claim to be entitled to that benefit for nothing, and, notwithstanding their breach of covenant, to be absolved from liability even for the sum it would have cost to carry out Tidey's proposed work. In all the circumstances of the case, I am not prepared so to hold. It appears to me that, in view of the landlords' long delay, and their refusal or disregard of Bernstein's and Coles' requests for information as to what they proposed to do, the matter had, before September 19, 1955 (when Tidey's men were ordered off), reached a stage at which the tenants were entitled to do the necessary work themselves, in the absence of a firm assurance from the landlords that they really intended to do without further delay that which was necessary in order to comply with the covenant, with sufficient details of the work proposed to give Coles a reasonable opportunity of judging whether what was proposed would put the roof in the state of repair which the covenant demanded.

As I have said before, the landlords gave no particulars beyond saying that the roof would be made watertight. They remained in breach of their covenant for months after service of the notice of disrepair. It is not clear that they ever admitted that they were under any obligation to do any work on the roof. They certainly maintained in their defence to the action that they were under no such obligation. They had had ample opportunity of complying with the covenant before Tidey's men ever came on the scene. I do not say that the tenants were wholly reasonable. They may have demanded more in the way of information as to the work proposed than they were strictly entitled to claim. On the other hand, the landlords were at least equally unreasonable. They were guilty of inordinate delay and undue reticence as to their intentions. The fact that they may have been asked for more information than they were obliged to give could not justify them in giving virtually no information at all. It would need a strong case to satisfy me that the tenants had by their conduct deprived themselves of their accrued and accruing claims for damages in respect of an undoubted and persistent breach of a continuing covenant such as this, and I do not consider that the defendants have made out such a case.

Accordingly, in my view, the tenants are entitled to damages in respect of the disrepair of the roof, even on the assumption we are asked to make that the work which Tidey was engaged to do would, if done, have satisfied the covenant. But clearly, on this assumption, the tenants' damages in respect of their expenditure on repairs to the roof must be limited to the reasonable cost of complying with the covenant by Tidey's method. It would seem—though this point has not been argued and I therefore express no concluded opinion upon it—that on the same assumption the landlords might be entitled to claim credit for any amount they had to pay Tidey in respect of the quarter of the work which he had done before being ordered off.

But my brothers, from whom I differ with diffidence, take a different view on this part of the case. The effect of their view appears to be that if the work proposed by Tidey would have been a sufficient compliance with the landlords' repairing covenant had he been allowed to complete it, then the tenants' claim must fail so far as the main (or slated roof) is concerned. The judge expressed no finding one way or the other on the question whether Tidey's proposals, if carried to completion, would or would not have constituted a sufficient compliance with the covenant. It seems that there must, accordingly, be a reference back to the judge for a finding on this question. This, and any other points arising as to the form of order to be made will, however, best be discussed after my brethren have delivered their judgments.

ROMER L.J. With the exception of one point, I am in full agreement with the judgment which my Lord has delivered. The only question on which I have the misfortune to differ from him is that which was referred to in argument as the "ready and "willing" point.

As to this, the tenants contend for various reasons that the landlords cannot succeed in their submission that they were willing to do the requisite repairs to the slate roof but were prevented by the tenants from doing so, and, accordingly, were not, in this respect, at least, in breach of their repairing covenant when the tenants issued their writ.

On the hypothesis, however, which we were asked to accept for the purpose of considering this question, that the method which Tidey proposed to adopt in order to do the work was adequate and satisfactory, it does appear to me that the landlords' submission is well founded. The tenants' first objection is that the landlords never gave them an unconditional assurance of their intention to do any work. It is true, that in his letter of July 7, 1955, Rusha told Coles that "Subject to my clients' "approval, I recommend that a reputable firm of builders should "be employed to overhaul both the roofs, replacing broken and "cracked slates and refixing where slipped." That, in itself, of course, is no more than a conditional recommendation and would be quite insufficient to support the defendants' case. But on September 13, 1955, Rusha wrote to Coles a letter which appears to me to amount to an unqualified intimation of intention to send the contractors on to the premises during the early part of the following week in order to do repair work; an intention which was, in fact, carried into effect. Therefore, I cannot accept the tenants' contention that the landlords never evinced, or communicated to them, a sufficiently definite intention to do any work to the roof.

The tenants' next objection is that the landlords did not in any case give them details of the work which they proposed to do. At one stage of his argument Mr. Megarry went so far as to say that before a landlord can enter upon the demised premises in order to perform his covenants to repair, he must supply the tenant with a detailed specification of the intended work. Mr. Megarry cited no authority in support of such a proposition and I am unable to accept it. Alternatively, he submitted that, if there is no specification, the landlord must at least furnish the tenant with such information as he possesses relating to the work, and that, in the present case, the defendants did not even show Tidey's estimate to the tenants. I should imagine that it is very likely that if Coles had asked Rusha to show him Tidey's estimate, a short and simple document, Rusha would have let him see it. What, however, Coles was wanting to see, as the correspondence shows, was a detailed specification of the work which the landlords were proposing to carry out, and this, as I have already intimated, was more than the tenants were entitled to demand—even if such a specification existed, which in fact it did not. In my judgment, Rusha's letters of July 7 and September 13 gave the tenants sufficient notification of what they were proposing to do and when they intended to do it; and it is to be observed that the last paragraph of the letter of July 1, being almost an echo of the relevant part of the schedule of dilapidations which the tenants had served on the landlords on January 31, 1955, cannot really have left Coles in any doubt as to the work which Rusha had it in mind to do.

[His Lordship reviewed the correspondence and continued:] In my judgment, accordingly, the landlords gave the tenants sufficiently clear notice of their intention to do the work, and sufficient information as to the nature of that work. What, then, in those circumstances is the result of their being prevented from doing it, and of the tenants repairing the slate roof themselves? On the assumption already referred to (viz., that the work which the landlords intended to do would have been a sufficient compliance with their covenant), the result, in my judgment, is that on this part of the case the tenants could not succeed. In asking for an order on the landlords to repay them for the work which they themselves did, they are asking in substance for damages for breach by the landlords of their repairing covenant. If, however, the tenants prevented the landlords from performing that covenant and then put it out of the landlords' power to perform it by doing the work themselves, I cannot see how it can be said that the landlords were then or thereafter in breach at all. In the event, therefore, of it being subsequently decided or admitted that the work referred to in the correspondence would have been a sufficient performance of the landlords' covenant if it had been carried out, I would hold that the tenants have established no cause of action so far as the slate roof is concerned.

On every other question I entirely agree with what my Lord has said, and there is nothing that I wish to add for myself.

ORMEROD L.J. I am in full agreement with the matters which have been dealt with by Jenkins L.J., and do not propose to deal with those matters, except on the last point, which has been called the "ready and willing" point.

Assuming that the landlords are right when they say that the work set out in Tidey's estimate was all that was necessary to put the roof in a proper state of repair, the question arises whether the landlords made known to the tenants that they were ready and willing to do this work. The contention of the tenants is that at no time did they have enough information of the proposed work to enable them to form any opinion as to its adequacy. From time to time in the correspondence they ask the landlords for a written specification of the proposed work, which the landlords refuse or neglect to give. The case is complicated by the fact that the lease does not give to the landlords any power to enter upon the land to perform their covenant. Mr. Megarry, however, referred us to *Saner* v. *Bilton*,[7] from which it appears that such a right may be implied. But, he argued, that this was a right to be exercised reasonably, and, in these circumstances, it was reasonable that the landlords should inform the tenants of the work proposed to be done. For the landlords it was argued that they had discharged their obligation, if they could show that they had engaged a competent surveyor and builder, and were acting on their advice. The tenants, on the other hand, contended that they were entitled to know exactly what it was the landlords proposed to do. In my judgment, each of these submissions goes too far. The tenants are, I think, entitled to know the general nature and purpose of the work to be performed. They have to put up with the inconvenience of having workmen on the premises, and it is reasonable that they should have such information as would enable them to judge whether the proposed repairs would be likely to fulfil their purpose. There is no doubt that the landlords made it known to the tenants that they proposed to do some work. They not only said so in their letters, but they sent a builder to the premises who actually started to do the work, but was sent away by the tenants' manager. It is clear too from the correspondence and from the evidence what work the landlords proposed to do. Whether that work would have been a sufficient compliance with the covenant is a question which will have to be determined by the judge. The question now is whether the tenants were sufficiently informed.

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[7] 7 Ch.D. 815.

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Ormerod L.J.

[After referring to certain of the letters passing between the parties, his Lordship continued:] On July 29 Rusha wrote to Coles, the tenants' architect. It is contended by the tenants that the use of the phrase "make the roof watertight" in this and subsequent letters indicated that the landlords intended to do no more than patch up the obvious leaks in the roof, which would not amount to putting the roof in repair. Reading the correspondence between the parties as a whole, I do not think this contention is justified. The question of the roof being watertight was a matter of urgency and was no doubt uppermost in the minds of the landlords' architect, but the reasonable inference appears to be that the landlords intended to carry out the work. That such was, in fact, their intention, is made clear from their correspondence with Tidey, the builder engaged by the landlords, and from the evidence given at the trial both by Tidey and Rusha.

It is unfortunate that, by September, 1955, the parties and the respective architects representing them, appear to have been at loggerheads. The tenants and their architect were demanding a specification of the proposed work, and the landlords were failing, for some reason, to make any attempt to comply with the demand. Rusha had in his possession an estimate from Tidey, a copy of which he could have sent to the tenants' architect. He did not do so, and it appears from the evidence that in this he was acting on the instructions of his clients.

[His Lordship, having considered further parts of the correspondence, continued:] In my judgment, it appears sufficiently from the correspondence between the parties that the landlords were prepared to do such work in the repair of the roof as would have complied with the tenants' original notice of want of repair. If the tenants were in any doubt about this, such doubt could, in my view, have been resolved if Coles had complied with Rusha's suggestion for a meeting, a suggestion which, in my view, was a very sensible and reasonable one. Coles and his clients, however, continued to insist on a written specification, which, as I have already said, they were not entitled to demand. I think the real trouble between the parties was that the tenants, on the one hand, were not prepared to be satisfied by anything less than stripping and recovering the roof, and, on the other hand, the landlords took the view that this was unnecessary, and that the replacement of broken, cracked and slipped slates was all that needed to be done. In my view, the tenants had sufficient notice of work which the landlords proposed to do. If the judge is of opinion that the proposed work would have been a sufficient

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compliance with the landlords' covenant, it would seem that there is no liability now on the landlords in respect of this item of the tenants' claim. The tenants have themselves stripped the roof and covered it with asbestos, so putting it out of the power of the landlords to comply with the covenant. If, of course, the judge is of a contrary opinion, the landlords will be liable in damages for such sum as it is eventually found would have been necessary to put the roof in proper repair.

Judgment of Vaisey J. set aside in so far as it was adjudged that the landlords were liable to the tenants for damages in respect of their failure to carry out the repairs to the auditorium roof, and declared that the landlords were liable for such repairs only if the repairs proposed to be carried out by them, if completed, would not have constituted compliance with the covenant in clause 3 (2) *of the lease. Ordered that it be referred to Vaisey J. for him to determine whether the repairs proposed to be carried out, if completed, would have complied with the covenant.** *Save as aforesaid, appeal dismissed.*

Solicitors: *Harewood & Co.; E. F. Turner & Sons.*

B. A. B.

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* *Note.* On June 16, 17 and 18, 1959, Vaisey J. heard the reference back. He held that the burden of proof was on the landlords, and that he could not say that the landlords' proposed repairs, if completed, would have complied with the landlords' repairing covenant. He accordingly gave judgment for the tenants for an agreed sum of £700 in respect of all repairs to the cinema, with costs.

1959
May 5.

Wynn-Parry J.

In re TATE'S WILL TRUSTS.
PUBLIC TRUSTEE *v.* TATE AND OTHERS.

[1954 T. No. 2172.]

Practice and Procedure—Revival of proceedings—Application for order to carry on—Proceedings worked out—Jurisdiction—Special circumstances—R.S.C., Ord. 17, *r.* 4.

A defendant, on an originating summons for the construction of a will, did not appeal from a decision that her father was absolutely entitled to the property there in question, in reliance on her father's promise that he would by his will leave her the property absolutely. He became estranged from his daughter and, on his death in 1957, he bequeathed her only a life interest in the property. Through the dilatoriness of her solicitors she was not advised until 1958 that she could apply under R.S.C., Ord. 17, r. 4, for an order that the proceedings should be carried on so that she could then apply to the Court of Appeal for leave to appeal out of time:—

Held, that the court had in special circumstances jurisdiction under Ord. 17, r. 4, to accede to the application notwithstanding that the proceedings had been worked out, and would do so in the circumstances of this case.

Dicta of Chitty J. in *Fussell* v. *Dowding* (1884) 27 Ch.D. 237, 240, 241 applied.

Arnison v. *Smith* (1889) 40 Ch.D. 567; 5 T.L.R. 413 distinguished.

PROCEDURE SUMMONS.

The applicant, Mrs. Frances Elizabeth Gaythorpe, took out a procedure summons for an order that certain proceedings by way of originating summons started in December, 1954, and on which judgment was given by Vaisey J. on April 19, 1955, to which she was the second defendant, might be carried on by the parties specified in the procedure summons.

The following were the circumstances which gave rise to the necessity of the procedure summons. The proceedings by way of originating summons were brought for the purpose of construing the will, dated January 7, 1910, of a testator, John Tate, who died on November 17, 1910. The language of the will raised some doubt as to the correct devolution of an estate known as the Bank House Estate in Northumberland, which had been in the Tate family for some considerable time; the details of the provisions of the will giving rise to the difficulty are not here relevant. An effort was made originally to arrive at a family arrangement, but that effort broke down because the elder brother of Thomas Bailey Tate, the applicant's father and the first defendant to the originating summons, insisted that in any family arrangement there should be reserved to the applicant only a life interest in the Bank House Estate. During the course of the negotiations the applicant's father made it clear to his daughter, not only orally but also in letters which were in evidence on the present summons, that on the assumption that he should find himself able to dispose of the whole of the estate, he would by his will provide that she should have the whole of his interest.

Following the breakdown of the effort to arrive at a family arrangement, it was decided in order to make clear beyond doubt what was the true devolution of the estate that a summons should be taken out for the construction of the will of the testator, and accordingly, in December, 1954, an originating summons was taken out for that purpose. The substantial dispute on that summons was between the first defendant, Thomas Bailey Tate, and his daughter, the present applicant, and the whole question turned on whether the rule in *Shelley's* case [1] applied to the provisions of the will relating to the devolution of the Bank House Estate. Vaisey J. expressed the view that it was a difficult case and a matter of some doubt, but came with reluctance to the conclusion that the rule in *Shelley's* case [1] did apply, although he said that there was much to be said for the other view; he held that the hereditaments and the capital moneys then constituting and representing the Bank House Estate were to be held in trust for the applicant's father in fee simple absolutely.

The applicant was advised that she had a right to appeal and also that there was a chance that that decision might be reversed on appeal. Wynn-Parry J. was satisfied from a consideration of the evidence that she decided not to lodge an appeal against a decision in her father's favour upon the faith of what he had said and continued to say, namely, that his will would be on the basis of leaving her his interest in the estate, which, as a result of the decision of Vaisey J., amounted to an absolute interest.

Until May, 1956, the applicant had every ground for thinking that the understanding, although in no way a binding or enforceable agreement, would be honoured by her father, with one variation to which she had no objection, namely, the interposition of a life estate in favour of her mother. But in May, 1956, she became aware that her father was intending to resile from the understanding. There had arisen some degree of estrangement between her and her father, for what reason she was unable to explain, but he became less well disposed towards her and intimated his intention to alter his testamentary dispositions, which were then so arranged as to provide that the whole of his interest in the Bank House Estate should go to his daughter, so as to provide only a life estate in her favour.

Her father died on June 7, 1957, having carried out the intention so to alter his will. In 1958 the applicant was advised that she could apply under R.S.C., Ord. 17, r. 4,[2] for an order that the proceedings should be carried on so that she could apply to the Court of Appeal for leave to appeal out of time.

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[1] (1581) 1 Co.Rep. 93b.

[2] R.S.C., Ord. 17, r. 4: "Where "by reason of marriage, death or "bankruptcy, or any other event "occurring after the commencement "of a cause or matter, and causing a "change or transmission of interest "or liability, or by reason of any "person interested coming into exist"ence after the commencement of the "cause or matter, it becomes neces"sary or desirable that any person "not already a party should be made "a party, or that any person already "a party should be made a party in "another capacity, an order that the

She now asked for an order that the proceedings started by way of originating summons might be carried on between the plaintiff thereof, the Public Trustee, and herself against Elsie Tate and Thomas Lancelot Williamson, the third and fourth defendants respectively, Grindley's Bank Ltd. and Charles Ian Mitchell Percy, two of the executors and trustees of her father, and the defendant, Elsie Tate, in her additional capacity as the remaining executor and trustee of Thomas Bailey Tate in the like manner as such proceedings might have been carried on between the plaintiff, her father, herself, Elsie Tate and Thomas Lancelot Williamson, if her father had not died.

E. J. A. Freeman for the applicant. The court has jurisdiction to grant this application, and, in the special circumstances, should do so. Although the delay appears to have been very long, for the greater part of it the applicant was, very naturally, relying on her father's promise to leave her his whole interest in the estate. It was not until a relatively short time before his death that she realised that he did not intend to carry out that promise. She consulted solicitors as soon as she became aware of it, but because of the inactivity of the solicitors then acting for her, it was not until after his death that she was advised by her present solicitors that she could apply under R.S.C., Ord. 17, r. 4; had she been properly advised before his death she could have applied straight away for leave to appeal out of time. If this application is granted she can do that now; it would be wrong to shut her out from so doing merely because of her father's death.

On the question of jurisdiction, Chitty J. in *Fussell* v. *Dowding*[3] was clearly of opinion that the mere circumstance that proceedings were worked out was not a ground for refusing an application, if special circumstances were shown justifying it. Here there are special circumstances amounting to a "sort of "equity" to prolong the period: see *per* Jessel M.R. in *Curtis* v. *Sheffield*.[4]

Arnison v. *Smith*[5] is not against this applicant, as in that

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"proceedings shall be carried on between the continuing parties, and "such new party or parties, may be "obtained ex parte on application to "the court or judge, upon an allegation of such change, or transmission "of interest or liability, or of any "such person interested having come "into existence."

[3] (1884) 27 Ch.D. 237, 240, 241.

[4] (1882) 21 Ch.D. 1.

[5] (1889) 40 Ch.D. 567; 5 T.L.R. 413.

case the application was to carry on at first instance an action that had already been decided, which was clearly impossible. The present case is quite different, as it is concerned with reviving the action in order to carry it a stage further, viz., to appeal. Even so, only Cotton L.J. in *Arnison* v. *Smith* [6] held that there was no jurisdiction, Lindley and Lopes L.JJ.[7] giving decisions only on the question of discretion. Moreover, Cotton L.J. suggested that the position might have been different if the applicants had been unable to start a new action. The application in *Fussell* v. *Dowding* [8] was made on the Court of Appeal's own suggestion, which indicates that the Court of Appeal did not consider that there was no jurisdiction to grant it.

Lloyd Stott for the defendants opposing the application, Elsie Tate and Thomas Lancelot Williamson. This application ought not to be granted. On the proper construction of Ord. 17, r. 4, the court has no jurisdiction to make such an order once the proceedings have ended and final judgment has been delivered. That appears from the terms of the rule itself. Chitty J. in *Fussell* v. *Dowding* [9] assumed without argument that there was jurisdiction, but the question whether or not the jurisdiction existed was never expressly considered. On the other hand, the observations of the Court of Appeal in *Arnison* v. *Smith* [10] appear to contradict that view. Cotton L.J. stated that an action could not be revised after final judgment.

Even if there be this jurisdiction (which is not admitted), the application should be refused on the merits, as the delay has been so long. There is no evidence when the applicant first consulted solicitors. It would create a state of great uncertainty if after final judgment a party could come along at any time thereafter and re-open the matter. [*Ashley* v. *Taylor* [11] was also referred to.]

WYNN-PARRY J. stated the facts set out above and continued: It may be asked why the applicant did not, in May 1956, take some categorical step, and, in particular, why she did not at once go to solicitors. She did in fact make an effort to persuade her father to honour the understanding. I regard that as a perfectly natural—indeed, a proper—course for a daughter to have taken. When, however, she found that her father's mind was apparently made up, she sought legal advice. According to the evidence before me, she failed to obtain that advice through delay and dilatoriness on the part of the solicitors then acting for her, so that no advice had been obtained by her as to what she could do in the circumstances before the death of her father in June, 1957. Before his death, she could have applied to the Court of Appeal for leave to appeal out of time. With his death, of course, a further difficulty stood in her way, and it was not until some time in 1958 that she was advised that she could take the step which she has now taken.

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[6] 40 Ch.D. 567, 570.
[7] Ibid. 570, 571.
[8] 27 Ch.D. 237.
[9] Ibid.
[10] 40 Ch.D. 567.
[11] (1878) 10 Ch.D. 768.

The evidence is not specific in showing when the applicant consulted her solicitors, but there is unchallenged evidence that the period between the applicant learning in May, 1956, that her father was changing his intentions and his death in June, 1957, is to be explained first by her endeavours to persuade him and, secondly, by the delay on the part of her solicitors. I am entitled, and indeed bound, in the absence of any challenge to that evidence, to accept that explanation.

Two main points have been debated. First, whether or not there is any jurisdiction, apart from the existence of any special reasons, to make an order such as that which the applicant now seeks, and secondly, assuming that there is such jurisdiction, do the facts which I have recited constitute sufficiently special circumstances to justify my making that order?

So far as the question of jurisdiction is concerned, the matter must be based on R.S.C., Ord. 17, r. 4.

[His Lordship read Order 17, rule 4 and continued:] Mr. Stott submitted that one need go no further than a consideration of the language of that rule in order to come to a conclusion that where proceedings have been worked out all jurisdiction to direct that they should be carried on has gone. But I do not think that the matter is capable of decision by such a short cut. In *Fussell* v. *Dowding*[1] Chitty J. had before him an application for an order to revive a suit or to carry on the proceedings for the mere purpose of appealing against a decree in 1872, the application being made to him in 1884. The facts are succinctly stated in the headnote[2]: "By a marriage settle-"ment the property of the wife was vested in trustees upon "trust for the wife, for her separate use, and in case there "should be no issue (which event happened) for the wife, her "executors, administrators, and assigns, if she survived her "husband, but if she died in his lifetime then for the husband

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[1] (1884) 27 Ch.D. 237.

[2] Ibid.

"for his life, and subject thereto for such persons as should "be of the wife's own kindred as she should by will appoint, "and in default of appointment for such persons as would be "entitled under the Statutes of Distribution, in case she had "died intestate and unmarried. The marriage was dissolved in "1871, and in 1872 the wife, in a suit instituted by her against "her late husband and the trustees of the settlement, obtained "a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the "wife disposed of the property as if it was her own absolutely, "and died in 1881, in the lifetime of her late husband"; and it was held that "in the absence of special circumstances, the "next-of-kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere "purpose of appealing against the decree of 1872." The first step in that matter was an application by way of motion to the Court of Appeal for leave to appeal from the decree dated July 12, 1872, and on the hearing of the motion the court directed it to stand over in order to enable the applicant to make such application as she might be advised to revive the suit. It was in those circumstances that the motion to revive the suit was launched and brought before Chitty J. Counsel for the surviving trustee of the settlement, in the course of his argument, said[3]: "The decree in this suit has been fully "worked out, and there remains nothing more to be done in "the suit. The court will not allow a suit to be revived for "the mere purpose of an appeal." In the course of his judgment, Chitty J. said[4]: "Now the applicant avowedly asks for "an order to revive simply for the purpose of appealing; when "I say 'revive,' I mean to carry on the proceedings. The rule "under which the present application is necessarily made is "rule 4 of order 17, and, passing by the introductory matter, "I refer to the rule for the purpose of reading these words only, "'where . . . it becomes necessary or desirable that any person "'not already a party should be made a party,' an order may "be obtained. It seems to me that the court has a discretion "in making the order, and the applicant is bound to show that "it is either necessary or desirable for the purpose of working "out the decree. In this case the decree admittedly has been "worked out, and a transfer of the funds has been made years "ago. The only object, therefore, is that there may be an

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[3] 27 Ch.D. 237, 239.

[4] Ibid. 240, 241.

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"appeal from the decree. It appears to me, having regard to "the observations which fell from the late Master of the Rolls "in *Curtis* v. *Sheffield*,[5] that in cases of this kind, where the "only object of a party asking for an order is to appeal, and "where there are no special circumstances in the case, where, "for instance, there is no suggestion of collusion or fraud, or "the like, and where there is no irregularity, as there was in "the case of *Walmsley* v. *Foxhall*,[6] where the decree had "erroneously dealt with future rights, the right rule to be "observed is this, that such an order should not be made after "the expiration of the time which is limited now for an appeal, "namely, one year." Later he said[7]: "I think that the application ought not to succeed, that it certainly is not 'necessary' "nor, in my opinion, 'desirable' that such an order should "be made."

As I read the judgment of Chitty J., it proceeded upon the basis that the circumstance that a suit had been fully worked out and nothing more remained to be done in the suit was not of itself a good ground for refusing to make an order to carry on the proceedings, and that if special circumstances could be shown to exist, then the court, in the exercise of its discretion, could make an order to carry on. In other words, his judgment must be taken to proceed on the basis that the mere fact that the suit has been worked out does not take away all jurisdiction from the court.

The difficulty with which one is at first confronted is the observations of the Court of Appeal in *Arnison* v. *Smith*.[8] In that case 54 shareholders having separate causes of action brought an action against the directors of a waterworks company, claiming damages for misrepresentation in the prospectus of the company. The action came on for trial before Kekewich J. on August 3, 1888, but the solicitor for the plaintiffs was not aware until after the commencement of the trial that two of the plaintiffs had died before the trial. No application was made to postpone the trial, and judgment was given for the defendants and the action dismissed. Later, the executors of the two deceased plaintiffs applied to Kekewich J., under R.S.C., Ord. 27, rr. 2 and 4, that the executors might be made parties and the action might be carried on between them and the defendants. That was refused by Kekewich J. and the matter was taken to appeal. Cotton L.J. stated that the difficulty in the case was that the action was at an end and there were no proceedings pending to which the two plaintiffs were parties before their deaths. He pointed out, in reference to the decision of Bramwell L.J. in *Booth* v. *Briscoe*,[9] which had been relied upon, that the judgment, rightly understood, had no bearing upon the present question. He said[10]: "As a matter of fact, "there were not separate actions in that case, but the plaintiffs "had separate causes of action, and the new rules gave power "to persons having separate causes of action to join in one "action. Lord Bramwell nowhere said in his judgment that "there were eight separate actions, but that there were eight "separate causes of action, and that the plaintiffs might have "brought eight separate actions. But they did, in fact, bring "one action, and in that action took a judgment for all the "plaintiffs for forty shillings damages. If they had properly "considered their position, they would have remembered that "though there was one action there were eight separate causes "of action, and have had the damages severally assessed. There-"fore, that case does not affect this question, whether there can "be an order to revive after final judgment has been given. In "my opinion the action could not be continued after final judg-"ment. It would be giving the executors of the plaintiffs power "to go on with proceedings which would be entirely different "from the action which was pending at their death. That "cannot be done under rule 4. All that can be done under "that rule is to carry on the action, but that is the action," referring to the case before him, "of the fifty-four plaintiffs. "It does not mean that after final judgment has been given "the representatives of deceased plaintiffs can maintain a "separate action against the defendants. The effect would be "to put the defendants in peril again at the suit of those who "did not appear at the trial." Later he said[11]: "If any "question were to arise respecting the Statute of Limitations, "we should have to consider what ought to be done, but in "this case that question does not arise." He recognised that the position was such that a new action could be brought by the representatives of the two plaintiffs, and that may in itself be a ground for explaining the course which was taken and may be itself a ground for distinguishing that case from *Fussell*

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[5] (1882) 21 Ch.D. 1.

[6] (1863) 1 De G.J. & S. 451.

[7] 27 Ch.D. 237, 241.

[8] (1889) 40 Ch.D. 567; 5 T.L.R. 413.

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[9] (1877) 2 Q.B.D. 496.

[10] 40 Ch.D. 567, 569.

[11] Ibid. 570.

v. *Dowding.*[12] Indeed, in the Annual Practice for 1959, the notes to R.S.C., Ord. 17, r. 4, state: "Where, as in *Salt* v. "*Cooper*,[13] it can properly be said that even after judgment "there is a cause or matter pending, an order to continue "proceedings might possibly be made, but not in such cases "as *Arnison* v. *Smith*,[14] where, two of several plaintiffs with "separate causes of action having died before trial, the action "was dismissed in ignorance of their deaths, and an order by "the executors of the deceased to carry on proceedings was "refused on the ground that a fresh action might be brought."

Further, Lindley L.J. said[15]: "I am not prepared to go "quite so far as Cotton L.J. in saying that the court has no "power to do what it is now asked to do. But the question "here is whether there is anything in the circumstances of this "case to render it necessary or desirable . . ." and he decided against the application on the ground that it was neither necessary nor desirable that the application should be granted.

Lopes L.J. said[16]: "Having regard to the language of the "fourth rule of order 17, I doubt if the rule applies after judgment, when the action is at an end, and there is nothing "more to be done under it. But assuming that we have "jurisdiction I am not satisfied that this is a case in which it "is necessary or desirable to exercise it."

As a judge of first instance, I am bound to come to the conclusion that the ratio decidendi of Chitty J. in *Fussell* v. *Dowding*[17] is binding on me, namely, that even though an action has been worked out, there is jurisdiction to accede to an application to revive it or to carry on proceedings if the necessary special circumstances are shown. The sole question on the law, therefore, is whether or not I am to treat what was said by the Court of Appeal in *Arnison* v. *Smith*[18] as in effect overruling the ratio decidendi in *Fussell* v. *Dowding*.[19] I have come to the conclusion that it would not be right for me, sitting at first instance, to give that reading to the observations, and particularly those of Cotton L.J., in *Arnison* v. *Smith*,[20] and if the clear ratio underlying the judgment of Chitty J. in *Fussell* v. *Dowding*[21] is to be regarded as no longer sound in law, that is a matter which, upon a proper application, should be pronounced upon by the Court of Appeal. I proceed, therefore, upon the basis that I have the necessary jurisdiction to accede to this application should I conclude, in the exercise of my discretion, that it is proper to do so.

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[12] 27 Ch.D. 237.

[13] (1880) 16 Ch.D. 544.

[14] 40 Ch.D. 567.

[15] Ibid. 570.

[16] Ibid. 571.

[17] 27 Ch.D. 237.

[18] 40 Ch.D. 567.

[19] 27 Ch.D. 237.

[20] 40 Ch.D. 567.

[21] 27 Ch.D. 237.

That brings me back to the question of the facts, and whether they can properly be regarded as "special circumstances" in the sense in which those words were used by Chitty J. In considering the effect of the evidence, it is desirable to bear in mind a phrase in the judgment of Jessel M.R. in *Curtis* v. *Sheffield*[22]: "The recent decisions as to special circumstances "excepting the appellant from the obligation to appeal within "one year, have been very stringent; I need not refer to them, "because everybody knows them, and they all lay down this "principle, that as a general rule an appeal after the time will "not be allowed unless the respondent has done something to "give a sort of equity to the appellant to go beyond the period." Those words, it is true, would primarily be a matter for consideration by the Court of Appeal if I were to accede to the application; but they are relevant to be taken into consideration on this application, because it is an application for the purpose of placing the applicant in a position to make the necessary application to the Court of Appeal for leave to appeal out of time.

I have stated the relevant facts, and given careful consideration to the question whether they can be regarded as special facts. It is true that it is my duty to pronounce one way or the other upon that question, but I cannot shut my mind to the fact that if I were to accede to this application the defendants, apart from any question of costs, which could be dealt with by a proper order, could hardly be prejudiced. That is not of itself a matter of any relevance on the question as to whether special circumstances exist, but I point out that if I were to refuse this application, then I shut out the applicant in limine.

I have come to the conclusion, not without a little hesitation, that in this case the evidence which I have reviewed can properly be regarded as special circumstances. Having said that, the less I say now, the better, because it will be, so far as the future course of this matter is concerned, for the Court of Appeal to decide whether or not the matter should go further. I desire to deal only with the matter before me, namely, should this

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[22] 21 Ch.D. 1, 5.

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preliminary step be allowed; and, for the reasons which I have given, I propose to make the order that is asked for on this summons.

Order accordingly.

Solicitors: *Slaughter & May; Robinson & Bradley for Charles Percy & Son, Alnwick.*

I. G. R. M.

C. A.

1959
July 13, 14.

Lord Evershed M.R., Hodson and Romer L.JJ.

In re ROYCE'S WILL TRUSTS.
TILDESLEY *v.* TILDESLEY AND OTHERS.

[1956 R. No. 2189.]

Will — Attestation — Trustee — Provisions in will for remuneration of trustee and solicitor — Attesting witness subsequently appointed trustee — Whether entitled to remuneration — Wills Act, 1837 (7 *Will* 4 *&* 1 *Vict. c.* 26), *s.* 15.

Solicitor—Remuneration—Will—Attestation by solicitor—Subsequent appointment as trustee—Whether entitled to remuneration.

A testator by clause 16 of his will provided that "if and so "long as my trustees are retaining any part of the trust fund "[his residuary estate] and receiving and applying the income" they were entitled to pay themselves 5 per cent. of the income thereof "to be equally divided between them by way of remunera"tion for their services . . ." By clause 17 he provided that "any person who may for the time being be an executor or a "trustee of my will and who may be a solicitor shall be entitled "to charge and shall be paid out of my estate for his services "in the same manner as though not being an executor or trustee "he had been employed by my executors or trustees to render "such services . . ."

One of the two trustees appointed by the testator died after proving the will; the surviving trustee appointed a solicitor, who had attested the will, to be a trustee in the place of the trustee who had died:—

Held, (1) that on the true construction of section 15 of the Wills Act, 1837,[1] the question was whether at the time of attestation any beneficial interest was given to an attesting witness under the instrument the execution of which he was going to attest, and that an attesting witness was not disqualified by the fact that after attestation he became interested under it by some later act or event; so that the solicitor, who attested the will, was not by virtue of section 15 precluded from taking benefits under clauses 16 and 17 of the will if he were, upon their true construction, otherwise entitled to them.

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[1] Wills Act, 1837, s. 15: " . . . if "any person shall attest the execution "of any will to whom or to whose wife "or husband any beneficial . . . in"terest, gift . . . shall be thereby "given or made, such . . . gift . . . "shall, so far only as concerns such "person attesting the execution of "such will, or the wife or husband of "such person . . . be utterly null and "void, and such person so attesting "shall be admitted as a witness to "prove the execution of such will . . . "notwithstanding such . . . gift . . ."

Observations of Mathew J. in *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311, 312 applied.

(2) That the solicitor was entitled to the benefits given both by clauses 16 and 17. By these clauses different amounts were given for different services to the trustees and were cumulative.

Wilson v. *O'Leary* (1872) 7 Ch.App. 448 considered.

Decision of Wynn-Parry J., ante, p. 191; [1958] 3 W.L.R. 676; [1958] 3 All E.R. 586 reversed.

APPEAL from Wynn-Parry J.[2]

By his will dated April 20, 1933, Sir Frederick Henry Royce, Bt., appointed the plaintiff, Mrs. Ethel Tildesley, and one Albert William Claremont, a solicitor, executors and trustees. After giving his residuary estate to his trustees upon trust to sell, the testator directed them to hold one-tenth of the residue upon trusts which had been held to be valid charitable trusts and, after giving certain bequests, he settled the trust fund constituting the balance of his estate as to two-fifths on his wife for life and as to two-fifths on the plaintiff for her life, with ultimate trusts for her children and, in default of children, as to part of the capital thereof upon the trusts declared by clause 9. By clause 9 the testator gave one-tenth of the trust fund to the children of his late sister of whom the second defendant, Mrs. Minnie E. Beare, was one.

By clause 16 he provided: "I declare that if and so long "as my trustees are retaining any part of the trust fund [his "residuary estate] and receiving and applying the income it shall "be lawful for them to pay to themselves out of such income "before dividing the same such a sum as shall equal five per "cent. thereof to be equally divided between them by way of "remuneration for their services. . . ." By clause 17 he provided: "I declare that Albert William Claremont or any person "who may for the time being be an executor or a trustee of "my will and who may be a solicitor shall be entitled to charge "and shall be paid out of my estate for his services in the "same manner as though not being an executor or trustee he "had been employed by my executors or trustees to render such "services. . . ."

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[2] Ante, p. 191; [1958] 3 W.L.R. 676; [1958] 3 All E.R. 586.

The testator died on April 22, 1933, and his will was proved in the Principal Probate Registry on June 6, 1933, by the plaintiff and Albert William Claremont. The latter died on August 5, 1934, and by a deed of appointment dated July 16, 1934, the plaintiff appointed the first defendant, George Henry Richards Tildesley, a solicitor, to be the other trustee of the testator's will.

By this summons the court was asked first to determine whether, having regard to the fact that Tildesley was an attesting witness to the testator's will, he had been and was entitled as a trustee of the will: (a) to receive remuneration for his services under clause 16 of the will, or (b) to charge professional remuneration as a solicitor against the testator's estate under clause 17; and, secondly, if question 1 was answered in his favour, whether Tildesley was entitled during his trusteeship, so long as the trustees retained any part of the trust fund and applied the income thereof, both to remuneration under clauses 16 and 17 of the will or was entitled at his option only to remuneration under one of such clauses. The defendants to the summons were Tildesley, Mrs. Beare and the Attorney-General.

Wynn-Parry J. held that Tildesley, as an attesting witness, was precluded by section 15 of the Wills Act, 1837, from taking any benefit under the will and accordingly that he was not entitled to remuneration for his service under clauses 16 or 17 of the will.

Tildesley appealed. Mrs. Beare gave notice that, in the event of the appeal being allowed, she would contend that Tildesley was entitled, at his option, to remuneration either under clause 16 or under clause 17 of the will but not under both clauses.

Sir Lynn Ungoed-Thomas Q.C. and *Raymond H. Walton* for the first defendant, the appellant Tildesley. The question is whether Tildesley is precluded by section 15 of the Wills Act, 1837, from taking the remuneration given to him by clauses 16 and 17 of the will. Section 15 of the Wills Act has a long history. It originated in section 5 of the Statute of Frauds. The emphasis in section 5 was on the capacity of the attesting witness at the time of attestation. On any view of the construction of section 5 of the Statute of Frauds, there was no question of looking beyond the time of attestation. The only question was whether the witness was a competent witness at that time. In *Thorpe* v. *Bestwick*[3] Mathew J. held that when a devisee under a will married an attesting witness after attestation, but before the testator's death, the devise was not destroyed. When that case was decided, a husband and wife were regarded as one person. The principle there applied was right and should be followed here. [Reference was made to Burn's Ecclesiastical Law, 9th ed., vol. 4, p. 94.]

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[3] (1881) 6 Q.B.D. 311, 312.

With regard to the cross-appeal: the bequest to the trustees for their services in clauses 16 and 17 are cumulative. These bequests are of different amounts and given for somewhat different services.

H. E. Francis for the plaintiff.

E. I. Goulding for the second defendant, Mrs. Beare. Section 5 of the Statute of Frauds operated to invalidate the will if one of the required witnesses was not a "credible" witness. It has never been decided whether on the true construction of the statute if one of the witnesses took a benefit the whole will was void or only the gift of the property in respect of which the witness took an interest. Under the Statute of Frauds the question was whether the instrument itself was valid, and it was necessary for that purpose to look at the position at the date of its execution. Lord Camden considered that under the old law it was necessary to consider the position at the date of the execution of the will. Lord Mansfield considered that the position of witnesses must be looked at at the date when it was examined by the court: see Burn's Ecclesiastical Law, 9th ed., vol. 4, p. 115 et seq. The Wills Acts of 1752 and 1837 present a new problem. They impose a personal disqualification on the witness, and the fact that the witness takes a benefit does not affect the validity of the will itself. The principle of the new Acts is that an attesting witness cannot take any benefit under the will. The result of the change in the form of the Act may be that the disqualification goes further than Parliament intended. Section 15 is clear in its terms. An attesting witness cannot take any beneficial interest, however remote that interest may be. The only safe test is to treat the disqualification as attaching to the person attesting the will. The decision in *Thorpe* v. *Bestwick* [3] is not against this proposition. The position of an attesting witness is different from that of a person who subsequently marries a witness. The fact that it may not be known at the time when the witness attests the will that he may take a benefit under it does not affect the disqualification: *In re Pooley.*[4]

[3] 6 Q.B.D. 311.

[4] (1888) 40 Ch.D. 1; 5 T.L.R. 21.

Tildesley can only claim to charge under clauses 16 and 17 of the will if he claims a benefit under the will. Where there is a gift to a class by a description, it may not be possible to tell whether an attesting witness is a member of that class or not. However, he cannot benefit if he is a member of it. If it is held that section 15 does not apply to the case where a witness is given a contingent interest, it will be simple for an attesting witness to escape the provisions of section 15. A witness must neither take a benefit under the will at the date of its execution nor at any later date. Under the old law an interest of an attesting witness, which was something less than a vested or contingent interest, was enough to disqualify: *Hindson* v. *Kersey.*[5]

This case must be distinguished from that where an instrument is good or bad from its inception. The disqualification of an attesting witness is a continuing disqualification.

If Tildesley succeeds in his appeal he cannot take remuneration both under clause 16 and clause 17. These two gifts to the trustees are in respect of the same services. The trustees cannot be paid twice: *Wilson* v. *O'Leary.*[6]

Denys Buckley for the Attorney-General. So far as the trustees' powers to charge under clause 17 imposes a charge on capital, the Attorney-General is concerned to dispute it on behalf of the charities who are interested in capital. It is submitted that section 15 falls to be applied on one of four different dates: (1) the date of attestation; (2) the date of the testator's death; (3) the date of the probate; and (4) the date when the benefit is taken. It is not only one date to which the section applies. It is necessary to look at the date of attestation to identify the witness and to identify his wife. Then in order to determine whether a gift is within the section it is necessary to look at the date when a benefit is claimed. If the witness is a member of a class taking a benefit he is precluded from benefiting. An attesting witness can never take any benefit at all under a will. It is not possible to say whether an attesting witness takes a benefit under a will until the trusts of the will have been worked out.

Sir Lynn Ungoed-Thomas Q.C. in reply. The phrase "any "beneficial . . . interest, gift . . . shall be thereby given or "made" may be used in either of two senses: it may mean given or made when the testator dies or it may mean given or made by the will.

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[5] (1760) Burn's Ecclesiastical Law, 9th ed., vol. 4, p. 116.

[6] (1872) L.R. 7 Ch. 448.

Lord Evershed M.R. The question raised in this appeal is one which Wynn-Parry J. found (as he said more than once) to be a difficult question. He added at one point that he could well imagine that different minds might take different views. The question turns, in the end of all, upon the proper construction, as applied to the facts of this case, of section 15 of the Wills Act, 1837.

[His Lordship read section 15 of the Wills Act, 1837, stated the facts, and read clauses 16 and 17 of the testator's will, and continued:] I may now state the question, which is this: the defendant, Tildesley, is one of the two persons who attested the will: is he, therefore, disqualified, having now become, by virtue of the appointment, a trustee, from claiming a benefit under either one of, or both, clauses 16 and 17 of the will? That is the problem which the judge, Wynn-Parry J., felt to be difficult. The only other party before us is the second defendant, Mrs. Minnie Elizabeth Beare (represented by Mr. Goulding). She is, as we understand, one of the children of the sister of the testator mentioned in clause 9, and, therefore, puts the argument on behalf of those who are interested to resist the claim of Tildesley to enjoy the benefits conferred by clause 16 or clause 17; and on behalf of Mrs. Beare a subsidiary point has been put forward, namely, that, in the circumstances, and as a matter of construction of the clauses, Tildesley, in any event, cannot claim to receive benefits under both clause 16 and clause 17. To that I will return presently; for the first question is: Having attested the will, can he now take any benefit at all under any of the provisions of the will? The argument, which succeeded in the court below, is that he cannot; and it is put on the broad lines that, having been an attesting witness, he cannot, within the terms of section 15 of the Act, take any benefit at all under the will which he attested.

I have myself, with all respect to the judge, come to a different conclusion; and I am at least comforted by the circumstance that he himself stated that he could well imagine that different minds might take different views. Putting it in its briefest form, it seems to me that the argument that Mr. Goulding and Mr. Buckley have put forward makes the section read as though it said: "If any person shall attest the execution of a will he shall "not thereafter take any benefit thereunder." That would perhaps have been a simple way to express the intention had that been the view of the legislature. But it is not the language of the section. The relevant terms are: "If any person shall attest "the execution of any will to whom . . . any beneficial . . . "interest . . . shall be thereby given . . .", then such beneficial interest shall be wholly null and void. As a matter of English, it seems to me that the language points, upon the face of it, to an inquiry at one date only, namely, the date when the will is being attested; and the question has then to be posed: At the time of the attestation is any beneficial interest given to the attesting witness under the instrument the execution of which he is going to attest? The phrase "any beneficial . . . interest ". . . shall be thereby given" has, however, this possible equivocation in it, that, in strictness and according to general principle, one cannot (of course) speak of a "beneficial interest" being "given" by a will before the testator has died. For certain purposes, therefore, it may be arguable (though it does not, as I think, arise in this case, and I prefer, therefore, to express no view) that it would be relevant to look at the date when the will came into operation. But subject to that possibility, it seems to me, I confess, that the section is contemplating a point of time when somebody is attesting a will; and the question has to be asked: Is any beneficial interest given to him under the instrument which is in question?

It will be noted that in the present case the right (if there be a right) to receive a benefit under the will does not arise by virtue of any expression used by the testator. When the execution of the will was attested the defendant Tildesley's name did not anywhere appear in it; and equally, of course, when the testator died he was not a beneficiary under the will. It has happened that, by an event—an act—of persons other than the testator, which occurred after the testator's death, Tildesley has been appointed a trustee—as anybody in the world might have been appointed trustee—to take the room of one named by the testator who had died or retired; and his interest under the will arises, therefore, from what might, naturally, in other circumstances, be called, properly, a novus actus interveniens; and I have come to the conclusion that it cannot be said, therefore, of this attesting witness that he was one, at any relevant date, to whom any beneficial interest was given by the will which he attested.

That view, to my mind, is supported also by two other considerations. The first is one of the history of the section. The first relevant enactment was that of the Statute of Frauds, set out in Burn's Ecclesiastical Law, 9th ed., vol. 4, p. 94, together with considerable discussions about its effect on the part of Lord

Mansfield and Lord Camden. I do not find it necessary to refer to what Lord Mansfield or Lord Camden stated at pp. 115 et seq.; but it is perhaps appropriate to read section 5 of the Statute of Frauds: " . . . all devises and bequests of any lands or tenements, " devisable either by force of the Statute of Wills, or by this " statute, or by force of the custom of Kent, or the custom of " any borough, or any other particular custom, shall be in writing, " and signed by the party so devising the same, or by some other " person in his presence and by his express directions, and shall " be attested and subscribed in the presence of the said devisor, " by three or four credible witnesses, or else they shall be utterly " void, and of none effect."

It is clear that the effect of section 5 of the Statute of Frauds was this: that, unless the devise or bequest was attested by three " credible " (that is, not disqualified) witnesses, the whole instrument, or at the very least the whole devise or bequest, was entirely void; and a witness was held to be incompetent if he, under the will, took any interest whatever in the subject-matter of the devise or bequest. The result, of course, was that if a non-competent person did attest a will, and there were not three other competent ones who did, the whole instrument, or (as I have said) at least a very material part of it, was avoided altogether.

The Wills Act of 1752 was clearly intended somewhat to mitigate that effect. It was (so far as is relevant for present purposes) exactly in the terms of section 15 of the Act of 1837, save that in the latter there is a reference to the wife or husband of an attesting witness. But it was admitted by Mr. Goulding (and, if I may say so, rightly) that the object of these enactments was to protect a testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed upon by someone who came and presented him with a will for execution under which the person in question was himself substantially interested; and if that is indeed the real object (as I think it is) of these enactments, then, to my mind, it does not seem to promote that object if this section is construed so as to disqualify someone who, at the time he attested the execution of a will, had no interest whatever under the will as it stood and only became interested under it by some later event or act—what I have called a novus actus interveniens: for example, if he should be the object of some appointment made by some person named in the will having a power to appoint; or (as in the present case) if he happened to be a person who was later appointed a trustee of the will by the then existing trustees.

The second consideration which in my judgment supports the view I take is that which I have already anticipated, namely, the reference to "wife or husband." In my readings of the section I omitted the references to wife and husband; but I will now read the relevant part of the section with the reference to "wife or husband" in it. "If any person shall attest the "execution of any will to whom or to whose wife or husband "any beneficial . . . interest . . . shall be thereby given," then such beneficial interest "shall, so far only as concerns such "person attesting . . . or the wife or husband of such person ". . . be utterly null and void."

If (following the argument of Mr. Goulding and of Mr. Buckley) the relevant words ought to be read as equivalent to "If any person shall attest the execution of a will who shall "thereafter take any benefit," and you add in the reference to the husband and wife—"who or whose husband or wife shall "thereafter take any benefit," then I find it extremely difficult to see how you can limit the wife or the husband, as the case may be, to an individual who happened to be the wife or the husband at the time the will was attested. If an interest subsequently taken as a result (as in this case) of a later appointment is sufficient to disqualify a trustee from his remuneration, then it would appear to me difficult to say that subsequent marriage to an attesting witness would not equally be a disqualification, since, at the time when the wife or husband took, she or he had acquired the character of being wife or husband of an attesting witness.

But Mathew J., in the year 1881, decided to the contrary in the case of *Thorpe* v. *Bestwick.*[1] In that case the marriage with the attesting witness occurred after the attestation but before the death of the testator; and Mathew J. said this[2]: "I think "the plaintiffs are entitled to judgment. The policy of the "Wills Act . . . in depriving the attesting witness of any legacy "given by the document of bequest, is not to allow wills to be "proved by the evidence of persons benefited by them, and it "makes void any devise to an attesting witness, or to his or her "wife or husband. In the present case the plaintiff, at the time "when the will was attested, took no benefit under it, but he "subsequently married the devisee, and I am asked to hold that

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[1] (1881) 6 Q.B.D. 311.

[2] Ibid. 312.

"the result of this marriage is to destroy the validity of the "devise."

Now in my judgment the reasoning of that decision is consistent, and consistent only, with the view that, in this case, the attesting witness is not disqualified by the fact that after attestation—indeed, in this case, after the death—he became interested by virtue of the appointment made of him as a trustee by Mrs. Tildesley.

For those reasons, therefore, I myself conclude that the defendant Tildesley is not, by virtue of section 15 of the Wills Act, excluded from taking benefits under clauses 16 and 17 of the will, if he be otherwise, upon their true construction, entitled to them.

That brings me to the second question. It will be observed that the remuneration which is given in clause 16, consisting of a share in 5 per cent. of the income, is stated to be "by way "of remuneration for their services." By clause 17 the testator states that Claremont or any other executor or trustee "who "may be a solicitor shall be entitled to charge . . . for his "services in the same manner as though not being an executor "or trustee he had been employed . . . to render such services."

What is said on behalf of Mrs. Beare is that this is really a duplication: that two legacies (for both operate in the nature of legacies) are given for one and the same thing, namely, services as a trustee; and although there is, or may be, a general rule in favour of cumulative gifts, if it appears that two gifts are given to the same person in one will, that rule does not apply in the case of gifts in favour of an executor for a specific purpose. But, in my judgment, that consideration does not here apply. In the case to which Mr. Goulding referred of *Wilson* v. *O'Leary*,[3] the rule against double gifts in favour of an executor was intimated, in passing, in the judgment as applicable to the case where the same amount was given to the same person for the same service. It is to be noted that here the amounts are quite different—in the one case a share of 5 per cent. of income; in the other (in effect) the right to charge profit costs. But the services, to my mind, are also not the same. The language perhaps might be improved; but clause 16 relates to the general services of trustees as trustees —whether lay or professional: clause 17 relates to professional services rendered by a solicitor in the course of his professional work. That is shown quite plainly by the very last words of the

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[3] (1872) L.R. 7 Ch. 448.

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will—" as though not being an executor or trustee he had been " employed by my executor or trustee to render such services."

It was necessary for Mr. Goulding to concede that, if he was right, notwithstanding the very clear and express language and the reference by name to Claremont, Claremont was equally disabled from taking under both clauses. Without saying more, I construe clauses 16 and 17 as giving the right first to Claremont and now to Tildesley (section 15 of the Wills Act being out of the way) to enjoy the benefits under both clause 16 and clause 17. The result is that, for the reasons which I have attempted to state, in my judgment the appeal should be allowed, and it should be declared accordingly that the defendant Tildesley is entitled, notwithstanding his attestation of the will, to the benefits which are conferred by clauses 16 and 17. I think it is unnecessary to say more than that. But formally, the cross-notice, which Mrs. Beare delivered under R.S.C., Ord. 58, r. 6, will, of course, be rejected.

Hodson L.J. I agree, and have nothing to add.

Romer L.J. I agree, and have very little to add. The question, and the only question, for this court is whether an attesting witness is disqualified from receiving a benefit which did not accrue to him—even as an expectancy—until long after the testator's death, the suggested disqualification deriving from section 15 of the Wills Act, 1837.

It is to be noted that neither at the date of the testator's will nor at the date of his death had the defendant Tildesley any beneficial interest in the estate which was recognisable at law or in equity; nor would he ever have received any beneficial interest at all but for the intervention of third parties—videlicet, those in whose hands lay the power of appointing new trustees.

Now take a gift of £1,000 to trustees, to invest and accumulate for 10 years, and then to distribute at the trustees' discretion among the then employees of a particular company. A attests the will but is not in the employment of that company either at the date of the will or at the date of the testator's death. Subsequently to the testator's death, he enters the company's employment, and is still in it at the end of the 10-year period. On the respondent's argument, any benefit that he then receives under the exercise of the trustees' discretion is struck at by section 15. I cannot believe that the section has such an effect. In the case supposed, it could not be said of A at any relevant time that he was an attesting witness to whom a beneficial interest was given by the will. I cannot see how the contrary view would be material in any way to the policy underlying the Statute of Frauds and the two Wills Acts—which was, to ensure that a man's testamentary disposition really does truly and freely express his own wishes, uncoerced by outside influence.

For myself, I think that Sir Lynn Ungoed-Thomas was right in saying that, in the present case, Tildesley was functus officio as an attesting witness long before it could be said of him in any sense that he was "interested" under the will. If that is right (and, in my judgment, it is), section 15 cannot have any application to the case; and I accordingly agree that the appeal should be allowed.

Appeal allowed. Declarations accordingly. Costs of all parties as between solicitor and client to be paid rateably out of corpus of funds in hands of trustees.

Solicitors: *Callingham, Griffith & Bate; Jaques & Co. for Ollard, Ollard & Sessions, Wisbech; Treasury Solicitor.*

B. A. B.

FOOTBALL LEAGUE LTD. *v.* LITTLEWOODS POOLS LTD.

[1958 F. No. 1178.]

1959
April 15, 16, 17;
May 13.

Upjohn J.

Copyright—Literary work—Information—Compilation—Football championship fixtures list—Whether fixtures list subject of copyright—Publication of extracts on football pools coupons—Whether infringement—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *ss.* 2 (1), (5) (*a*) (*b*) (*f*), 48 (1).

The plaintiffs, the Football League Ltd., were incorporated to promote Association Football and to arrange football competitions for their member clubs, which were grouped in four divisions. The rules of the League provided for the arrangement and subsequent confirmation at annual meetings of League championship fixtures, copyright in such fixtures to be vested in the League. In the championship each club in each division played every other club in the division twice in a season, once at home and once away. When each club had indicated its wishes as to the arrangements for

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[Reported by MARGARET THOMAS, Barrister-at-Law.]

matches in answers to a questionnaire sent out by the League, the clubs' fixtures lists were compiled by one S., who received a fee from the League for so doing, it being agreed that the copyright should belong to the League, and S. (who had done the work for some years) had from time to time made assignments of the copyright in their favour. The compilation entailed a great deal of work and required a high degree of skill and ingenuity. The clubs' fixtures lists were circulated to the clubs, and after they had made any necessary amendments and an annual fixtures meeting, at which remaining difficulties were settled, had been held, S. prepared a chronological fixtures list. This list was printed with the names of the clubs in alphabetical order and sent to the clubs and the press upon payment, a claim to copyright and a warning against reproduction without permission being printed upon it; it was also published in the same form in the Football League Handbook for the season. The making of the chronological list was not difficult but it required hard work and a painstaking accuracy.

The defendants, Littlewoods Pools Ltd., ran a system of gambling based on the results of the league matches, and each fortnight they sent out to their customers coupons containing lists of fixtures which were admittedly copied from the League's chronological list of which they had procured a copy.

In an action by the plaintiffs claiming, inter alia, a declaration that they were entitled to a subsisting copyright in the chronological lists, and an injunction to restrain the defendants from infringing the copyright:—

Held, (1) that, on its true construction, the word "any" in section 2 (5) (*a*) of the Copyright Act, 1956,[1] was not wide enough to extend protection to compilations which had not been protected under the Copyright Act, 1911, so that the matter fell to be determined in accordance with the principles laid down in the authorities on the earlier Acts.

(2) That, although there can be no copyright in information per se, including that of the predetermination of future events of one's own creation, and even though there was insufficient skill, labour or effort in reproducing the chronological list from the clubs' lists to support a claim to copyright in the former, of necessity the information in the programme of fixtures had to be reduced to writing, and the skill, labour, time, judgment and ingenuity of the League, their servants or agents, which, on the facts, had been brought to bear in compiling the clubs' fixtures lists, could not be separated from the

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[1] Copyright Act, 1956, s. 2: "(1) Copyright shall subsist, subject "to the provisions of this Act, in "every original literary, dramatic or "musical work which is unpublished, "and of which the author was a "qualified person at the time when "the work was made, or, if the "making of the work extended over "a period, was a qualified person for "a substantial part of that period. . . . "(5) The acts restricted by the copy"right in a literary, dramatic or "musical work are—(*a*) reproducing "the work in any material form; "(*b*) publishing the work; . . . "(*f*) making any adaptation of the "work."

S. 48 (1): " . . . 'literary work' "includes any written table or com"pilation."

work of compiling the chronological list, and that, accordingly, the League were entitled to copyright in the chronological list.

Purefoy Engineering Co. Ltd. v. *Sykes Boxall & Co. Ltd.* (1955) 72 R.P.C. 89 and *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* [1926] Ch. 433; 42 T.L.R. 370 considered.

(3) That the deliberate systematic pirating by the defendants week by week of the relevant part of the chronological list under a claim of right amounted to a reproduction of that compilation and an infringement of the League's copyright, and the League, therefore, was entitled to the declaration sought, but, since the 1958–59 season was now over and no chronological list for the next season was yet in existence, an injunction would be refused.

Cate v. *Devon and Exeter Constitutional Newspaper Co.* (1889) 40 Ch.D. 500; 5 T.L.R. 229 applied.

Held, further, that even if the compilation of the chronological list had merely consisted of the reproduction of the clubs' fixtures lists, so that there was no element of skill and ingenuity, there was nevertheless sufficient painstaking hard work to justify a claim for copyright.

H. Blacklock & Co. Ltd. v. *C. Arthur Pearson Ltd.* [1915] 2 Ch. 376; 31 T.L.R. 526 followed.

Quaere, whether, had the defendants scrambled the list of matches so that they were not in alphabetical order, they could successfully have argued that they were only using the information and not reproducing the compilation.

ACTION.

The plaintiffs, the Football League Ltd., were incorporated in 1904 to promote Association Football and to make rules, including arrangements for the benefit of clubs in membership with the League, for football competitions. Membership of the League consisted of clubs which were full members, grouped together in two divisions known as the First and Second Divisions of the League championship, each division containing 22 clubs, and clubs which were associate members grouped together in the Third and Fourth Divisions, each division containing 24 clubs. Under rule 22 of the League's rules provision was made for championship fixtures to be arranged and then confirmed at annual fixtures meetings and for the copyright to belong to the League, in whom the copyright should vest. In the league championship each club in each division played every other club in the division twice in a season, once at home and once away; the season began each year late in August and continued to the end of April.

In March of each year a questionnaire was sent out by the secretary of the League to each club to discover its wishes as to certain matters, such as with which club in the same area it wished to "pair," that is, to play away, when that club was playing at home, and as to Bank Holiday and floodlighting arrangements. When the answers were received the secretary held a conference with one Harold Sutcliffe, who prepared from them fixture lists of the matches to be played during the following season. For this Sutcliffe received a fee, it being agreed that the copyright in the lists should belong to the League and from time to time he had executed assignments of the copyright in their favour. The compilation entailed a great deal of work and required a high degree of skill and ingenuity. The fixture lists were then sent out to the clubs with a claim to copyright printed thereon and after they had made any amendments and the annual fixtures meeting attended by club representatives had been held Sutcliffe prepared a chronological fixture list which was printed and sent out to the clubs, and to the press upon payment, together with a warning against reproduction except with permission. The list was also published in the same form in the Football League Handbook for the season. The making of this list required painstaking accuracy and hard work.

The defendants, Littlewoods Pools Ltd., ran a system of gambling based on the results of the league matches and they sent out each fortnight coupons containing lists of football matches, which lists were admittedly copied from the League's chronological list, a copy of which they had procured.

By this test action the plaintiffs claimed (1) a declaration that they were entitled to a subsisting copyright in the chronological lists; (2) an injunction to restrain the defendants by their servants or agents or otherwise from infringing the copyright by reproducing the chronological lists or any substantial part thereof on football pools coupons or otherwise and from distributing any such coupons or other infringing material without the consent of the plaintiffs; and (3) damages for infringement of copyright and conversion.

By their statement of claim the plaintiffs alleged that a large number of companies, including the defendants, had for a number of years carried on the business of promoting football pools whereby the public were invited to estimate each week the results of football matches in the plaintiffs' league championship, very large sums being paid each week by the public and large prizes being won; that for those pools the defendants and other pools promoters used coupons upon which were printed parts of the plaintiffs' current chronological lists; that in connection with the 1958–1959 football season correspondence had recently taken place between the plaintiffs and the Pools Promoters

Association, of which the defendants were members, in which the plaintiffs had stated that they would in future require a licence fee for the use of their fixture lists, but the Association had denied the subsistence of such copyright; that the defendants had reproduced the 1958–1959 chronological fixture list and threatened and intended to continue reproducing the lists on their coupons, and that the coupons infringed the plaintiffs' list and the defendants, by issuing the coupons, had converted it to their own use.

The defendants denied that any copyright could or did subsist in the chronological lists.

The facts are more fully stated in the judgment.

Sir Milner Holland Q.C. and *F. E. Skone James* for the plaintiffs. The chronological list is a compilation the preparation of which required sufficient skill and labour to attract copyright. Protection was given in the following cases: *British Broadcasting Company* v. *Wireless League Gazette Publishing Co.*[2] (an arrangement of broadcasting programmes); *H. Blacklock & Co. Ltd.* v. *C. Arthur Pearson Ltd.*[3] (Bradshaw's Railway Guide); *Winterbottom for the Western Australian Turf Club* v. *Wintle*[4] (race card); *Canterbury Park Racecourse Co. Ltd.* v. *Hopkins*[5] (race card); *Collis* v. *Cater, Stoffell & Fortt Ltd.*[6] (chemist's catalogues). There has been here an infringement of a " substantial part " of the copyright within the meaning of section 49 (1) of the Copyright Act, 1956. What is a " substantial part " is a question of fact, and the test is not necessarily quantitative: *Saunders* v. *Smith*[7]; *Bramwell* v. *Halcomb*[8]; *Hawkes & Sons (London) Ltd.* v. *Paramount Film Service Ltd.*[9] It is none the less an infringement if the matter is copied indirectly from the protected work: *King Features Syndicate Inc.* v. *O. & M. Kleeman Ltd.*[10]; *Cate* v. *Devon and Exeter Constitutional Newspaper Co.*[11]; *Hanfstaengl* v. *Empire Palace.*[12] Thus, even if copyright were not claimed for the chronological list itself, a claim would lie in respect of it since it was copied from the clubs' fixtures lists. " Literary work " in section 2 (5) (*a*) is defined by section 48 (1) to include " any " written table or compilation."

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[2] [1926] Ch. 433; 42 T.L.R. 370.

[3] [1915] 2 Ch. 376; 31 T.L.R. 526.

[4] (1947) 50 W.A.L.R. 58.

[5] (1931) 49 W.N.(N.S.W.) 27.

[6] (1898) 78 L.T. 613.

[7] (1838) 3 Myl. & Cr. 711.

[8] (1836) 3 Myl. & Cr. 737.

[9] [1934] Ch. 593; 50 T.L.R. 363.

[10] [1940] Ch. 523, 806; [1941] A.C. 417; 57 T.L.R. 586; [1941] 2 All E.R. 403.

[11] (1889) 40 Ch.D. 500; 5 T.L.R. 229.

[12] [1894] 2 Ch. 1; 10 T.L.R. 288, 299.

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Football League Ltd. v. Littlewoods Pools Ltd.

[Upjohn J. I should have thought that it would still have to be a literary work.]

Yes. The writing of chance figures might not be covered. It is conceded that no change in the law was intended by the introduction for the first time in section 48 (1) of "any" in the definition of "literary work."

K. E. Shelley Q.C. and *D. W. Falconer* for the defendants. It is settled law that one cannot have copyright in news or information but only in the literary form of an account of news or information: *Walter* v. *Steinkopff* [13]; *Chilton* v. *Progress Printing and Publishing Co.*[14]; *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.*[15]; *Odhams Press Ltd.* v. *London and Provincial Sporting News Agency (1929) Ltd.*[16]; *Leslie* v. *Young & Sons* [17]; *Greyhound Racing Association Ltd.* v. *Shallis.*[18] A person having the right to predetermine future events cannot have copyright in the mere predetermination because it is not a literary work. A simple example of this proposition occurs when the M.C.C. selection committee meets at Lord's to select the 16 players who will represent England on a tour of Australia. To select the players the committee has to apply very considerable thought and skill, and the list of players which they publish creates a set of facts; it would be an unwarranted extension of copyright, however, to say that the committee should have the exclusive right to publish the information. There cannot be a monopoly in facts, but only in the way of presenting them, and it is a question of fact whether the skill and labour involved in presentation justify the incidence of copyright: *G. A. Cramp & Sons Ltd.* v. *Frank Smythson Ltd.*[19] In *Kelly* v. *Morris* [20] the labour involved in compiling a directory attracted copyright, but if the information can be compiled without skill (as in the present case, where Sutcliffe compiled the chronological list from the clubs' lists) it is not entitled to protection. To give a monopoly in the dissemination of information is to go beyond the present authorities, with the exception of two Australian cases: *Canterbury Park Racecourse Co.* v. *Hopkins*,[21] which is unsatisfactory, and *Winterbottom* v. *Wintle*,[22] which is wrong. The ratio decidendi of the judgment of Eve J. in the *Odhams Press* case [23] was that the work in question was news, and that one could not have copyright in news. Lord Wright M.R., on appeal,[24] was saying that the case had lost sight of the distinction between information and literary form, and although he expressed no final view he was wrong to imply that the compilations might have been the subject of copyright.

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[13] [1892] 3 Ch. 489; 8 T.L.R. 633.

[14] [1895] 2 Ch. 29; 71 L.T. 664.

[15] [1910] 2 Ch. 297; 26 T.L.R. 527.

[16] [1935] Ch. 672; 51 T.L.R. 554; [1936] Ch. 357; 52 T.L.R. 229; [1936] 1 All E.R. 217.

[17] [1894] A.C. 335.

[18] (1923–28) Macg.C.C. 370.

[19] [1944] A.C. 329; 60 T.L.R. 477; [1944] 2 All E.R. 92.

[20] (1866) L.R. 1 Eq. 697.

[21] 49 W.N.(N.S.W.) 27.

[22] 50 W.A.L.R. 58.

[23] [1935] Ch. 672.

The skill, labour and ingenuity of Sutcliffe were directed not to the preparation of a fixture list but to the production of a programme of games that would be most satisfactory to the clubs; the information necessarily had to be reduced to writing, but being creative such reduction could not give rise to a claim for copyright: *Purefoy Engineering Co.* v. *Sykes Boxall & Co. Ltd.*,[25] which shows the distinction between labour in acquiring information (in the present case deciding when and where the fixtures are to be played) and that involved in reducing the information to literary form, the latter labour not being relevant for copyright purposes as it requires no taste, selection, judgment or ingenuity.

[UPJOHN J. The undoubted skill and ingenuity are exercised to ensure a successful football season. The results of the activity must be reduced to writing because nobody can remember over 2,000 matches.]

Yes, but the skill and labour required to reduce to writing either the clubs' lists or the chronological list is not sufficient to attract copyright.

[UPJOHN J. That seems to be more difficult, since many catalogues the compilation of which do not seem to me to involve much skill have been held to attract copyright.]

If the fundamental proposition that there can be no copyright in news is correct, then the question of "substantial part" does not arise. Further, as the chronological list has no literary merit in the sense of grammatical composition, there was no infringement since the defendants published the information in a different form, i.e., by instalments.

Sir Milner Holland Q.C. in reply. The basic question is where to start considering the application of skill and labour: examples where they were applied prior to the compilation of the lists are *British Broadcasting Company* v. *Wireless League Gazette Publishing Co.*,[26] the *Odhams Press* case[27] and *Collis's* case.[28] The chronological list conveyed useful information and it had at some stage required skill and labour which were directed to purposes other than the publication of the list. It could not be segregated from the skill and labour without which it could not have been compiled. The M.C.C. could not seriously suggest that a document announcing the team to tour Australia was in any sense a compilation. A systematic taking week by week of the whole list subject to the few transpositions amounted to an infringement.

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[24] [1936] Ch. 357.

[25] (1955) 72 R.P.C. 89.

[26] [1926] Ch. 433.

[27] [1935] Ch. 672; [1936] Ch. 357.

[28] 78 L.T. 613.

Cur. adv. vult.

May 13. UPJOHN J. read the following judgment: This action is brought to restrain the defendants, Littlewoods Pools Ltd., from copying a list of league football matches prepared by the plaintiffs, the Football League Ltd., in which copyright is alleged to exist. The League are responsible for organising each year that well-known series of football games known as league matches between clubs who are members or associate members of the League. Football must now be taken as the national winter sport of this country and it attracts vast crowds of followers or fans who watch these games. League football together with the Football Association Cup matches form the major opportunities for this interest. All members or associate members of the League are professional clubs who provide sport for the populace and at the same time have financially to make both ends meet. Seeing the use made by pools promoters of league matches through gambling activities based on the results, the League think, perhaps not unreasonably, that they might receive some contribution. The defendants and other companies who promote pools do not share that view. Hence this action. I say no more on that score, but return to a brief description of league football activities.

Nearly all league matches are played on a Saturday afternoon, that being the day on which the large section of the British public who are interested in watching football matches are free to take their recreation. The League is organised into four divisions. Formerly there were three divisions, but since the beginning of the last season (the 1958–1959 season) there have been four. In each of the first two divisions there are 22 clubs and in each of the other divisions there are 24 clubs, making a total of 92 clubs. The essence of league competition is that each club in each division plays every other club in its division twice in a season, once at home and once away. It is essentially a " ladder " competition. At the end of the season in the first two divisions the two at the bottom of each division are relegated to the top of the next lower division and the top two of the second and third divisions are promoted to the next higher division. The bottom four clubs in the third division are relegated and replaced by the top four clubs in the fourth division. In the fourth division the bottom four clubs have to stand for re-election. The club at the top of the first division holds the League Championship for that year. The organisation of these matches and the arrangement of fixtures between clubs is a responsible and difficult matter. It is not a matter of drawing lots or anything of that sort, but for the reasons that I will explain in a moment, the arrangement of these fixtures is a highly skilled matter.

The supreme body governing the sport in this country is the Football Association, and as is well known they have each season a competition for the Football Association Cup. The season starts in late August in each year and continues to the end of April, the final of the Football Association Cup always being played at Wembley on the first Saturday in May. The arrangements for the following season start in March with an interview between the secretary of the League, at present one Hardaker, and representatives of the Football Association. The secretary is then informed which Saturdays will be available for playing league matches and on which Saturdays matches will be played for the Football Association Cup ties. This is very important, for the first two rounds of the Football Association Cup take place on Saturdays before Christmas and on those occasions the lower divisions do not play in league matches as they are playing in those rounds. The top divisions only enter the Football Association Cup in the third round, which takes place after Christmas, and on the day appointed for that round they do not play in league matches. Matches in the later rounds naturally depend entirely on the success of the clubs in the earlier rounds.

The next step is for the secretary to send out a questionnaire to all the league clubs. In 1958 it was sent out on March 31. The first question is: " (1) What club do you desire to be paired " with? "—that is, to be away when such club is at home. That shows at once the real difficulty of preparing the list of fixtures. To take a simple example, if Manchester City is playing at home on a given Saturday, it is essential that Manchester United should be playing away. If both are playing at home the gates will suffer and the clubs will not make sufficient money. If both are away, football followers, the all-important customers, will be disappointed of a top class game and what, perhaps, is equally important, may not spend any money on football that week. They must therefore "pair." I have given a simple example, but in densely populated areas the matter is more complicated. Let me give another example: Burnley pairs with Blackburn Rovers, Blackburn Rovers with Preston North End and Preston North End with Blackpool. That means that to obtain a satisfactory state of affairs (that is, to please the football followers and to obtain good gates) for any given Saturday if Burnley is playing at home Blackburn Rovers must be away, Preston North End at home and Blackpool away. So that the difficulty of preparing a really satisfactory fixture list in each division is at once apparent. That is not the only difficulty. As I have said, each club must play every other club in the same division twice, so that each club will play 42 matches for example in the first division, but there will only be 35 or 36 Saturdays available, so that some matches must be played in the middle of the week or at Bank Holiday weekends. Some clubs are prepared to play in the evening under floodlights while others will not do so. Obviously a mid-week match must be played on the local early closing day. The questionnaire is therefore designed to find out clubs' wishes in respect of these matters. I will read the remaining questions: "(2) What is "your best day for midweek matches? (3) Have you, or will "you have, floodlighting installed for season 1958–1959? (4) Are "you prepared to play under floodlights? (5) Have you any "particular local holiday date when you desire to play at home? "(6) Two games will be played at Christmas on December 25, "26 or 27. Which date do you prefer for a home fixture? "(7) Do you desire a home fixture on January 1, 1959, instead "of a mid-week fixture or a Christmas or Easter fixture? In "this respect please note that the Third Round of the F.A. "Cup will be played on January 10, 1959. (8) If January 1 "is not a holiday in your area are you prepared to play away "on this day? (9) Do you prefer Good Friday, Easter Monday "or Tuesday for your home game at Easter? Easter Saturday "is classed as an ordinary Saturday. (10) Any other relevant "information, including any particular difficulty last season." The clubs answer this questionnaire and a summary of the answers is prepared in the secretary's office.

The next step is for the secretary to have a conference with one Harold Sutcliffe. Sutcliffe is a practising solicitor, but he, like his father before him, seems to have a special flair for settling league fixtures and this he does every year for and on behalf of the League and for which he is paid a fee. He has no other connection with the League. Sutcliffe and the secretary have a discussion on the summary to try and iron out any obvious difficulties or snags. Sutcliffe is told the available Saturdays for league matches and he takes away the questionnaire and summary and prepares a draft fixture list. By this time he knows what clubs will be promoted and what clubs will be relegated. He does not know, however, which clubs will be elected or re-elected to the lowest four places at the bottom of the fourth division and he calls them A, B, C, D. This work of preparing the list of fixtures is one that requires much skill and hard work. It is not possible to give effect to perfect pairing in every match nor to give effect to the wishes of every club in every particular; that would be beyond human ingenuity and skill, but Sutcliffe tries so far as his undoubted skill and ingenuity can do so to meet the wishes of all the clubs and to observe the essential of pairing. To assist him in this work he has two charts, one for the first and second divisions and one for the third and fourth divisions, which were prepared many years ago by his father when he used to undertake this work. Sutcliffe, whose evidence I accept unreservedly, explained to me fully how the chart works and I shall do no more than try to make a short summary of his evidence. Let me take the chart for divisions 1 and 2 as an example. There are 22 vertical columns because there are 22 clubs. The horizontal lines represent the playing days. The chart is so arranged that columns 1 and 2, 3 and 4, 5 and 6, and so on down to 21 and 22 form complete pairs; that is to say, the club in column 1 will always pair with a club in column 2, the club in column 3 will pair with the club in column 4 and so on. It was then found that, if one omits horizontal columns 8 to 11, vertical columns 1, 3 and 5 each pair with columns 2, 4 and 6 throughout the chart, so that for last season Sutcliffe made Blackburn Rovers No. 2, and Preston North End No. 3, making a complete pair; Blackpool No. 4 and Burnley No. 5, again making a complete pair, and in addition Preston North End pairing with Blackpool and Blackburn Rovers with Burnley. In addition to this the mid-week fixtures and Bank Holiday weekend fixtures have to be worked out. It is largely a matter of painstaking trial and error. Sutcliffe makes a trial shot, filling in clubs on the chart in columns Nos. 1 to 22, works it out and sees how the result comes out. The operation may take 9 or 10 hours, but before he is fully satisfied he may make 9 or 10 trial shots, putting clubs in different order at the top of the chart.

Finally he gets results which satisfy him and meet, so far as possible, the wishes of the clubs. It is fair to say that in doing this work he also tries to fit in on the same principles other leagues, and reserve teams, and this greatly complicates his work. Nevertheless, I am satisfied that his work in connection with the four league divisions with which I am concerned represents a vast amount of labour and a high degree of skill and ingenuity.

He then prepares a typewritten list of club fixtures, which I shall refer to as " the clubs' list." That shows on one page for each club the fixtures the club will play throughout the season. That is sent to the secretary of the League, who carefully checks it, and then a print containing complete series of fixtures club by club for all the divisions is prepared, and a claim to copyright, rightly or wrongly, is printed thereon in large letters. Copies of this document are sent to each of the clubs. Last season it was sent out on May 21, 1958, together with information as to the clubs likely to be A, B, C, and D. The covering letter appointed a day (last season May 31) for the club fixtures meeting to be held in accordance with rule 22 of the rules of the Football League. Each club sends its representative, probably the secretary, and any difficulties are raised and discussed and finally settled at the meeting which Sutcliffe attends as adviser. According to rule 22 the final decision on the fixture list rests with the League, but in practice resort to the League is unnecessary. There is not great controversy, the meetings are not expected to take more than half an hour because, to use Sutcliffe's words, the clubs have been educated to recognise that making changes in fixtures may well upset the scheme, especially in the case of Saturday fixtures. Occasionally changes have to be made, but for the season 1958–1959 out of the total number of 2,028 matches to be played in all four divisions, only 17 changes were made at the meeting. The lists are finally agreed at this meeting and the representative of each club has to sign the list relating to his club and it is handed in to the secretary. These documents are then handed to Sutcliffe, who takes them away and in two or three days produces the chronological fixture list, which I shall call " the chronological list." A claim to copyright is printed on this document. This is the document in which copyright is alleged to exist and which is allegedly infringed. It shows day by day throughout the season who is playing whom and where, for the home team is always shown first. In each division the list is arranged alphabetically.

The preparation of this list from the final edition of the clubs' list is, of course, automatic and requires only a painstaking accuracy. The chronological list is then sent out to the clubs and to the press upon payment, together with a warning against reproduction except with permission.

I can deal with the activities of the defendants very shortly. This is a test action and the defendants are sued in fact, though not in form, as being representative of the Pool Promoters Association. I do not propose to give any explanation of their activities as they are so well known and so widespread that they have even attracted to themselves some statutory obligations. Suffice it to say that, as is well known, they run a system of gambling based on the results of the league matches on Saturdays. For this purpose they send out every fortnight coupons for the following two Saturdays containing lists of football matches upon which their customers make their choice. The object is to try and pick out matches which result in a draw. Basically these lists for each Saturday contain the league matches to be played on that Saturday. On Cup Tie Saturdays, the defendants use the list of cup ties, which are no concern of the League, but on every other Saturday, which form, of course, the great majority of Saturdays in the season, the league matches are the basis. Some time was taken up in evidence before me exploring differences in the defendants' list compared to the chronological list due to the incidence of cup ties and changes of ordinary league matches, but in the end no argument was based on it and so I do not review it. Subject to these immaterial differences it is clear that throughout the season, Saturday by Saturday, league matches are the basis of the defendants' coupons. Each week the defendants prepare coupons for the use of their customers and it is not in dispute that the list for their treble chance pool is copied directly from the chronological list of which the defendants have managed to procure a copy. The selection of matches for other pools is made from the same list. This was most fairly admitted by the defendants' executive officer responsible for the production of their football pool coupons, one Clare, a most candid and fair witness. To the treble chance list there will be added some Scottish matches. The defendants have 29 agents situated in various parts of the country who check on the matches to be played each week, because sometimes, although on the whole infrequently, the dates and places of some matches between members of the League are altered with the assent of the League. This happens more frequently towards the end of the season when a cup tie may have had unexpected results. Perhaps some third division club has survived more rounds than was expected, or perhaps some first division club has got knocked out unexpectedly early. In such cases changes in league fixtures have to be made to meet the situation, but on the whole they are few compared to the great body of matches and I am satisfied that substantially the defendants copy week by week throughout the season the entries for that week directly from the chronological list. Indeed, the defendants have been perfectly candid about it and it is not disputed. For a short time they did transpose two matches in each division, but it is not relied on. In those circumstances I do not propose further to review the evidence, which I accept, as to how the various items on the defendants' coupons are prepared.

I conclude the facts by saying that if any copyright in any relevant document resides in Sutcliffe he has assigned it to the League.

Upon those facts two main points arise: first, is the League's chronological list susceptible of being the subject-matter of copyright and, if so, secondly, has it been infringed by the actions of the defendants? Copyright is statutory and depends on the terms of the Copyright Act, 1956. Section 2 (1) is in these terms: "(1) Copyright shall subsist, subject to the provisions of this "Act, in every original literary, dramatic or musical work which "is unpublished, and of which the author was a qualified person "at the time when the work was made, or, if the making of the "work extended over a period, was a qualified person for a "substantial part of that period." Section 2 (5), so far as is relevant, is in these terms: "(5) The acts restricted by the copy-"right in a literary, dramatic or musical work are—(*a*) repro-"ducing the work in any material form; (*b*) publishing the work; ". . . (*f*) making any adaptation of the work." Section 48 defines "literary work" as including any written table or compilation.

Read literally, the use of the word "any" in section 2 (5) (*a*) makes the definition of included material very wide indeed, wider possibly than under the Copyright Act, 1911, but, in my judgment, no extension was intended, and the matter must be determined in accordance with the principles laid down in the authorities on the earlier Acts. Compilations frequently, though not, of course, necessarily, consist of merely quasi-statistical reference matter such as railway time tables, horse-breeding material, catalogues, indices, solar and lunar calendar events and reference directories. Such material has no literary merit in the sense of having grammatical composition. The chronological list falls into this category of compilations; as to such compilations the law is clear, but difficulty arises in its application. Copyright for such a compilation can be claimed successfully if it be shown that some labour, skill, judgment or ingenuity has been brought to bear upon the compilation. The amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright is a question of fact and degree in every case.

Lord Atkinson put the matter in this way in the Judicial Committee of the Privy Council in *Macmillan & Co. Ltd.* v. *K. & J. Cooper* [1]: "What is the precise amount of the knowledge, "labour, judgment or literary skill or taste which the author of "any book or other compilation must bestow upon its composi-"tion in order to acquire copyright in it within the meaning of "the Copyright Act of 1911 cannot be defined in precise terms. "In every case it must depend largely on the special facts of "that case, and must in each case be very much a question "of degree." That passage was treated as laying down the law by Lord Simon L.C. in *G. A. Cramp & Sons Ltd.* v. *Frank Smythson Ltd.*[2] There are many authorities in the books, some on one side of the line, some on the other, but I shall not refer to them for it is largely a question of fact and degree in each case, and this case, in particular, must turn on its own peculiar facts.

Mr. Shelley, for the defendants, has argued, in effect, that in the circumstances of this case the above formulation of the law has small relevance. He submits, and I agree with him, that it is clearly settled law that there can be no copyright in information or in an opinion per se. Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion. There are many cases to that effect: see, amongst others, *Walter* v. *Steinkopff* [3]; *Chilton* v. *Progress Printing & Publishing Co.*[4]; and *Odhams Press Ltd.* v. *London & Provincial Sporting News Agency (1929) Ltd.*[5] Mr. Shelley rightly points out that in this case the League is in the unique position of being the only person in the world who, prior to publication, is in possession of the information contained in the fixture lists. The League creates that information and it alone knows who will play whom and where on any given date. Copyright, it is submitted, cannot be claimed in respect of such information: if, says Mr. Shelley, you create information, for example, as to the composition of the next M.C.C. team to try and recover the Ashes, the selectors cannot claim the exclusive right to publish it for it is mere information. You cannot, he submits, have a statutory monopoly (that is, copyright) in the mere publication of the predetermination of future events when such events are, and must necessarily be, of your own creation; thus the publication of future football fixtures is the mere announcement of information in the exclusive possession of the announcer, that is, the League, and anyone is entitled to use that information. Mr. Shelley admits that there is some limitation upon that proposition, namely, that, where the facts are represented in some special way, it then becomes a question of fact and degree as to whether the skill and labour involved in such special representation of the information is entitled to copyright. With these general propositions I agree. It is in their application to this case that the difficulty arises.

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[1] (1923) L.R. 51 Ind.App. 109, 125; 40 T.L.R. 186.

[2] [1944] A.C. 329, 335; 60 T.L.R. 477; [1944] 2 All E.R. 92.

[3] [1892] 3 Ch. 489; 8 T.L.R. 633.

[4] [1895] 2 Ch. 29; 71 L.T. 664.

[5] [1936] Ch. 357; 52 T.L.R. 229; [1936] 1 All E.R. 217.

Those general propositions Mr. Shelley applies to this case in this way. He submits that the skill, labour and ingenuity expended by Sutcliffe are directed to the production of information; they are not directed to the preparation of a fixture list at all, but to the production of a programme of football games to be carried out by members of the League: a programme designed to give the most satisfactory results to league football and to its followers by reducing clashing events to a minimum and by meeting, so far as it is possible to do so, the wishes of each club. So, he says, Sutcliffe's work had really nothing to do with the production of a document. He was preparing information which of necessity had to be reduced to written form, but, being purely creative information, the mere reduction into writing of that information could not give rise to any claim for copyright.

Mr. Shelley illustrated his point by reference to *Purefoy Engineering Co. Ltd.* v. *Sykes Boxall & Co. Ltd.*[6] The facts in that case were very complicated and ranged far beyond anything I have to consider. Putting the relevant facts very shortly, the plaintiffs were makers of standard parts to be used by customers in the manufacture of jigs. The defendants copied these jigs and it was recognised that this was permissible in the absence of passing off. The plaintiffs also prepared elaborate

[6] (1955) 72 R.P.C. 89.

catalogues. It was argued that the plaintiffs' goods "repre-"sented" in physical form the description in the catalogues and therefore any catalogue issued by the defendants, though not copied directly from the plaintiffs' catalogues, must infringe the plaintiffs' copyright, for both catalogues would describe the same goods and therefore the defendants' catalogues must necessarily be closely akin to those of the plaintiffs. This argument was rejected, and in doing so Lord Evershed M.R., reading the judgment of the court, said[7]: "In our judgment, "Mr. Shelley's argument involves the transposition of an "essential sequence in the chain. For, in our judgment, it is "not true to say that the parts made and offered by the "plaintiffs 'represented' in physical form the descriptions in "the catalogue—at least in any sense relevant to the considera-"tion of copyright in the latter, as a literary work. Rather, the "contents of the catalogue described the parts made and offered "by the plaintiffs. And the considerable skill and labour devoted "by the plaintiffs in making their selection was devoted to the "selection of the range of goods in which the plaintiffs were to "trade and not for the purpose of bringing into existence the "literary work, namely, the catalogue. No doubt skill and "labour were employed for the latter purpose, but skill and "labour of a different order. The selected range of goods "existed or was capable of existing for trading purposes inde-"pendently altogether of the plaintiffs' catalogue or of any "catalogue."

Mr. Shelley submits that the state of affairs here is analogous. The work that Sutcliffe did resulted in the preparation of the clubs' list. Whether copyright could have been claimed for the clubs' list is not in point here, but if Mr. Shelley is right I doubt whether there would be such copyright (though Mr. Shelley would not commit himself on the point), for the essence of his case is that Sutcliffe is not basically concerned with the production of documents but with information leading to real fixtures to be played, and that the reduction of such information into writing is a mere incidental. So the argument runs.

However, whether or not copyright could have been claimed for the clubs' list, Mr. Shelley submits that there can be no such claim for the chronological list for insufficient labour is expended thereon to justify a claim for copyright. He submits that the only skill, labour and effort which can be called in aid in support of a claim to copyright is that involved in reproducing the chronological list from the clubs' list and that requires no element of taste or selection, judgment or ingenuity and nothing more than the good offices of a clerk whose only qualifications need be painstaking accuracy. To this point I shall return later.

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[7] 72 R.P.C. 89, 99.

The problem, therefore, at this stage resolves itself into the question whether, as Mr. Shelley submits, you must regard the activities of the League, its servants and agents (and that really means the activities of Sutcliffe) in producing the fundamental scheme for the following season's football programme as being an activity directed to the production of non-copyright information to be made readily available to the public, or whether the League's activities may properly be regarded as leading to the production of Sutcliffe's documents, the clubs' list or the chronological list, so that they may be regarded as compilations to which the entire energies of Sutcliffe may be attributed. If the latter be the true view, then let me say at once that I am satisfied, on the evidence, that the energies of Sutcliffe from start to finish are of a high order judged by any standard. His work represents much skill, labour, time, judgment and, above all, ingenuity, and on this view, therefore, is entitled to copyright.

Sir Milner Holland, for the League, submits that, if Mr. Shelley's point is sound, a number of the earlier authorities must have been differently decided. Thus, he says, in *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.*[8] it was decided that the British Broadcasting Company had copyright in the Radio Times, which published the week's radio programmes. In that case Mr. Macgillivray, for the defendants, took very much the same point as does Mr. Shelley, that you cannot have copyright in a programme consisting of a bare list of items. Astbury J. held that the plaintiffs' compilation was a publication involving considerable time, skill, labour and expense and, being a compilation of several advance programmes, was entitled to copyright whatever might have been the result with regard to one programme. That case certainly decides that you can have copyright in the material form in which you present original created information, but I do not think it decides the point I have to decide, namely, whether you can take into account the early work done by Sutcliffe in preparing the fixtures. When Astbury J. held that the plaintiffs' publication was one involving considerable skill, labour and expense, I do not understand him as including the preliminary work (which is analogous to part of Sutcliffe's work in this case) such as fixing dates, times and artists, but to be referring to the actual work of compilation after those matters had been fixed.

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[8] [1926] 1 Ch. 433; 42 T.L.R. 370.

The next case on which Sir Milner relied was *Collis* v. *Cater, Stoffell & Fortt Ltd.*[9] The plaintiff, who carried on a chemist's business, prepared an alphabetical list of patent and proprietary preparations which was copied by the defendants. Thus that again was a case where the plaintiff expended skill mainly in the way of selection and in actually preparing the list. It does not help me on this point.

Finally, there is the Australian case of *Winterbottom for the Western Australian Turf Club* v. *Wintle*,[10] where a " Race Card " of runners was prepared, which was then sent to the handicapper who, after much study of the form, allotted weights to the various horses. It was argued, as here, that the handicapper's undoubted skilled labour was directed not to the preparation of a list of entries but to the achievement of a close race by allotting weights to the various horses, and of course that was so. It was then argued that the race card merely " eventuated " and could not be the subject-matter of copyright. Wolff J. held [11] that the race card was the result of sufficient skill and labour to attract a claim to copyright and therefore I understand him to say it was unnecessary for him finally to decide the point I have to decide. He dealt with the matter very shortly and in any event the judgment does not bind me.

Every case must depend on its own facts. It is perfectly true that Sutcliffe was not employed to produce a work of art per se nor even a work primarily as a book of reference, such as a directory or a railway guide, but he was employed to produce the best possible programme of fixtures. Of necessity, however, that programme had to be reduced to writing. The League's duty is to arrange the best possible programme of games to please the football public in general and the clubs' finances in particular, and they can only do that by producing a list or lists of those games. If, as a result of prolonged cogitations, Sutcliffe reaches the conclusion that it will be best if, for example, Arsenal plays Manchester City at Highbury on September 20, 1958 (as the programme provided), he is doing so no doubt primarily because that is best from the point of view of league football, but if, as the result of the whole of his prolonged and skilled cogitations, he produces in a particular form the season's list consisting of 2,028 matches or thereabouts, in my judgment he or the League (who have, by direct assignment, any copyright which might otherwise vest in him) are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the League, their servants and agents. In my judgment, on the facts of this case, it is not open to the defendants to try and dissect and break down the efforts of Sutcliffe in the way suggested. Accordingly, in my judgment, the plaintiffs are entitled to copyright in the chronological list.

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[9] (1898) 78 L.T. 613.

[10] (1947) 50 W.A.L.R. 58.

[11] Ibid. 67.

I return to Mr. Shelley's point that if, contrary to my view, he is right on his major premise and that the only work of compilation consists in the production of the chronological list from the clubs' list then that, he says, does not involve a sufficient element of skill and labour to justify a claim for copyright. I should regard this as a borderline case. I accept it at once that in such a compilation there is no element of skill, of selection, of taste, of judgment or of ingenuity. As the secretary of the League said, there is no difficulty—it is automatic. But, I would add, it involves a great deal of painstaking hard work with complete accuracy as the keynote. That was all that was required, for example, in *H. Blacklock & Co. Ltd.* v. *C. Arthur Pearson Ltd.*[12] I think that the matter may be tested in this way. Suppose the League did no more than issue the clubs' list. Suppose an enterprising publisher conceived the idea of publishing a complete chronological list, which he thought might prove useful to football patrons, and puts one on the market. That work proving successful, suppose it is pirated, that is, deliberately copied by another. In my judgment the enterprising publisher (though perhaps by the narrowest of margins) would be entitled to claim that the work involved sufficient work and labour to justify the existence of copyright therein. True there would be in that suppositious case the argument that there was competition between infringer and infringed, and there is none here, but that is not decisive: see *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.*[13] Had it been necessary to do so, I should have been prepared to find in the League's favour on this ground also.

The next main question is whether the defendants have infringed the League's copyright. The defendants' case is that where you have a mere compilation with no true literary merit in the sense of grammatical composition there can be no infringement by copying in weekly instalments. It is submitted that, if you have some book which has true literary merit in the sense of grammatical composition (though it may be the worst journalese) to copy one instalment may well be a breach of copyright, but where that is absent, as admittedly it is here, and you are copying a mere list, you must look at the plaintiffs' document and the defendants' alleged infringement and compare them. So judged, there can be no infringement. No authority was cited for this and I do not think it right to bring into the realm of copyright tests appropriate and familiar in trade mark and passing off cases. Once the League establishes copyright the real question is whether the defendant is "reproducing the "work in any material form," or "making any adaptation of "the work." That depends on the facts of this case.

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[12] [1915] 2 Ch. 376; 31 T.L.R. 526.

[13] [1910] 2 Ch. 297, 305.

The undisputed facts fundamental to my decision in this case are that the chronological list itself is taken by the defendants and used by them line by line and division by division in exactly the same order as the plaintiffs for the preparation of each of their coupons week by week throughout the season (except in the few cup tie weeks, which together with a few league match changes, as I have already pointed out, may be disregarded as de minimis) and they do this deliberately and under a claim of right so to do. True it is that in this case there is no competition between plaintiffs and defendants, but, as I have already pointed out, that is not decisive of the case. If the defendants like to use the information contained in the chronological list and prepare their own lists by "scrambling" the order of matches so that the divisions were all mixed up and so that there was no alphabetical order, it is possible that it could be successfully argued that they were using only the information and were not reproducing the compilation, but that is not a question I decide, nor do I speculate on the defendants' customers' reactions on receiving such a list. What in fact the defendants have done each week is in substance to copy exactly the League list for that week, throughout the season.

I find some assistance on this point from *Cate* v. *Devon & Exeter Constitutional Newspaper Co.*[14] In that case the plaintiff published weekly a list of bankruptcies, bills of sale and so on, the names being listed by counties. The defendants took week by week such names for the county of Devon. The relevant entries pirated formed naturally a very small part of the whole. That case, while not on all fours with the present, has, however, a strong family resemblance. North J. said [15]: "Then there is a "further point raised by the defendants that the amount that "has been taken from the copyright publication is very small. "In one paper I think out of the three weeks papers which "have been put in evidence there was only one entry taken; "in another there were, I think, four; in the third only a small "number; but in considering these it must be borne in mind "that all that is material for the defendants for the purpose of "their newspaper has been taken, and that it is taken entirely— "copied exactly from the paper—taken regularly, systematically, "every week, and published for the purpose of giving information to the very persons to whom the plaintiffs intend their "publications to give that information; and, what is more "important still, the defendants now claim to do it as of right; "and that of itself is quite sufficient to put them in the wrong "in the action and get over any question as to the amount of "matter actually taken from the particular publication which is "in evidence. It seems to me, therefore, that the defendants "have been wrong throughout: they had no right to take this "matter in which the plaintiffs have copyright, and the action "is well founded."

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[14] (1889) 40 Ch.D. 500; 5 T.L.R. 229.

Upon the whole I have come to the conclusion that this systematic pirating by the defendants week by week throughout the season of that part of the League's list which is relevant to that week deliberately and (by their defence of this action) under a claim of right amounts in the end to a reproduction of the plaintiffs' compilation and infringes accordingly.

I propose to declare that the League is entitled to copyright in their chronological list. I shall further declare that by copying the League's chronological list week by week in their coupons for the football season 1958–1959 the defendants infringed the League's copyright.

I shall not grant any injunction for the 1958–1959 season as the season is now over, and I do not propose to grant any injunction relating to next season or to give liberty so to apply, first because I do not know what methods the defendants will employ to prepare their coupons for next year, and, secondly, because of the difficulty pointed out by North J. in *Cate's* case [16] in his judgment immediately following the passage I have read, to the effect that it is difficult to see how the plaintiffs can now claim any protection for a document which, judged by last season's dates, at the moment has no existence though no doubt it is now in the course of preparation.

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[15] 40 Ch.D. 500, 507.

[16] Ibid.

Declarations accordingly.
Inquiry as to damages;
costs reserved.

Solicitors: *Johnson, Weatherall & Sturt for Parker, Rhodes & Co., Rotherham; Jaques & Co. for North, Kirk & Co., Liverpool.*

BARCLAYS BANK LTD. *v.* INLAND REVENUE COMMISSIONERS.

[1958 B. 3270.]

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July 1, 2, 3, 21.

Lord Evershed M.R., Romer and Pearce L.JJ.

Revenue — Estate duty — Valuation — Shares — Control of company — Shares held by deceased beneficially—Shares held as trustee jointly with co-trustees—Shares settled by deceased—Deceased first on share register—Whether register of members conclusive—Whether deceased in control of company—Method of valuation—Finance Act, 1894 (57 *& 58 Vict. c.* 30), *s.* 7 (5)*—Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 55, 58 (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company — Control — Estate duty purposes — Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55.

Meaning of "deemed."

At the date of his death on December 15, 1955, the deceased owned beneficially 1,100 shares in a company. By a settlement made on December 1, 1936, he had settled 3,650 shares in the same company upon trust for his wife and children, he himself taking no benefit. The deceased had always been a trustee of the settlement. His name appeared as the first of the four trustees' names in the company register, and since Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the company's articles of association, it was he who exercised the powers of voting.[1] The issued share capital of the company had always been 8,350 shares, so that the 3,650 settled shares and the 1,100 shares he held beneficially together amounted to more than half the issued share capital.

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[1] Companies (Consolidation) Act, 1908, Table A:—Art. 60: ". . . On "a poll every member shall have one "vote for each share of which he is "the holder."

Art. 61: "In the case of joint "holders the vote of the senior who "tenders a vote, whether in person "or by proxy, shall be accepted to the "exclusion of the votes of the other "joint holders; and for this purpose "seniority shall be determined by the "order in which the names stand in "the register of members."

The trustees took out a summons to determine whether the deceased had control of the company within the meaning of section 55 of the Finance Act, 1940,[2] in which event the 1,100 shares should be valued for estate duty by reference to their assets value in accordance with section 55 (2), or, whether they should be valued by reference to their market value under section 7 (5) of the Finance Act, 1894:—

Held, (1) (by Lord Evershed M.R. and Pearce L.J.) that the phrase "control of the company" in section 55 (1) (*a*) of the Finance Act, 1940, is a wide phrase, and that subsection (3) is a definition provision, and in that subsection "the control of powers "of voting" means no more than the "control of voting," the words being apt to cover a person who could either by the exercise of the voting power himself or by the exercise of rights he held indirectly command or produce the result that the majority of the votes would be given as he wished, and that prima facie the section applied to the deceased.

(2) That control of a limited company depends upon its own constitution, and what it does is determined by the resolutions of its corporators, so that those, who command a majority in general

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[2] Finance Act, 1940, s. 55, as amended: "(1) Where for the pur-"poses of estate duty there pass, on "the death of a person dying after "the commencement of this Act, "shares in or debentures of a com-"pany to which this section applies, "then if—(*a*) the deceased had the "control of the company at any time "during the five years ending with "his death . . . the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of subsection (5) "of section 7 of the Finance Act, 1894, "shall be estimated by reference "to the net value of the assets "of the company in accordance with "the provisions of the next succeed-"ing subsection. . . . (3) For the "purposes of this section a person "shall be deemed to have had control "of a company at any time if he "then had—(*a*) the control of powers "of voting on all questions, or on "any particular question, affecting "the company as a whole which if "exercised would have yielded a "majority of the votes capable of "being exercised thereon . . . or if "he could have obtained such con-"trol . . . by an exercise at that "time of a power exercisable by him "or with his consent. . . . (5) Con-"trol of a company which a person "had in a fiduciary capacity shall be "disregarded for the purposes of this "section. . . ."

S. 58: "(4) References in this "Part of this Act to a disposition's "being made by any person, to a "power's being exercised or exercis-"able by any person, . . . include "references to its being made, or "being exercised or exercisable, or "being done, by him and another "jointly or by another at his direc-"tion or by a company of which he "had control within the meaning of "subsection (3) of section 55 of this "Act, whether with or without the "consent of any other person; . . . "(5) References in this Part of this "Act to a person having any power "or control or doing any act in "a fiduciary capacity shall be con-"strued as references to his having "that power or control or doing that "act in a fiduciary capacity imposed "on him otherwise than by a dis-"position made by him and in such "a capacity only."

meeting, control the company, and it is nihil ad rem that those who control the company are themselves controlled from without.

(3) That the Crown had discharged the onus which rested upon it of showing that the deceased during the relevant period by virtue of the 3,650 shares registered in the names of himself and his three co-trustees—his own name being first on the register—and of the 1,100 shares of which he was the registered proprietor and beneficial owner was "in control of the company" within the meaning of section 55 (1) and (3) of the Act of 1940.

Inland Revenue Commissioners v. *J. Bibby & Sons Ltd.* (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167, and *Inland Revenue Commissioners* v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491 followed.

Shields (*John*) *& Co.* (*Perth*) *Ltd.* v. *Inland Revenue Commissioners*, 1950 S.C. 441; (1950) 29 T.C. 475 applied.

(4) *Per* Romer L.J.: The deeming provisions in subsection (3) of section 55 are supplementary to or expansive of subsection (1) and not merely expository, subsection (1) dealing with direct control and subsection (3) with indirect control, and that, on the facts, the case fell within subsection (1), the deceased having the "control of the "company" by reason of his voting power, and regard need not be had to subsection (3) of section 55.

Decision of Danckwerts J., ante, p. 341; [1959] 2 W.L.R. 99; [1959] 1 All E.R. 65 reversed.

APPEAL from Danckwerts J.[3]

The deceased, Tom Shipside, died on December 15, 1955, having, by his will dated December 18, 1952, appointed the plaintiffs to be his executors and trustees. Probate was granted to them on March 24, 1956. The estate of the deceased included at his death 1,100 fully paid ordinary £1 shares in T. Shipside Ltd. registered in the sole name of the deceased, and these shares he owned beneficially. By a settlement dated December 1, 1936, the deceased settled 3,650 fully paid ordinary £1 shares in the company upon trust for the benefit of his wife and his children, he himself taking no beneficial interest. The deceased and two other persons were the original trustees, but as a result of an appointment made on November 30, 1948, when one of the original trustees retired, the deceased and three other persons became the trustees and remained so until the deceased's death. The 3,650 shares were registered in the company's register of members in the names of the four trustees, the name of the deceased appearing as the first holder. The company had been incorporated under the Companies Acts, 1908 to 1917, and Table A of the Companies (Consolidation) Act, 1908, had been

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[3] Ante, p. 341; [1959] 2 W.L.R. 99; [1959] 1 All E.R. 65.

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incorporated in the articles of association. The deceased was therefore the person with the right to exercise the votes.

The issued share capital of the company had always been 8,350 ordinary £1 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital. It being uncertain whether the deceased had control of the company so as to affect the valuation of the 1,100 shares for estate duty, the plaintiffs took out a summons to determine whether, upon the true construction of section 55 of the Finance Act, 1940, the principal value of the 1,100 shares should be estimated in accordance with the provisions of section 55 (2) of the Act of 1940, or in accordance with section 7 (5) of the Finance Act, 1894. If the former method, which required the value of the shares to be estimated by reference to the net value of the company's assets, were adopted, the burden of estate duty would be higher than if the valuation were made under section 7 (5) of the Act of 1894, which provided for a valuation by reference to the market value of the shares.

Danckwerts J. held that the deceased did not have control of the company within the meaning of section 55 of the Finance Act, 1940, and that his shares should be valued under section 7 (5) of the Finance Act, 1894.

The Commissioners of Inland Revenue appealed.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Commissioners of Inland Revenue. The question is whether the deceased had control of T. Shipside Ltd. within section 55 of the Finance Act, 1940, by reason of his shareholding. If he had control, the 1,100 shares which he owned beneficially will be valued on an assets basis. If he did not have control, the shares will be valued under section 7 (5) of the Finance Act, 1894, and the value will be considerably lower. In *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* [4] the House of Lords held that "control" and "controlling interest" meant voting control, and rejected the contention that controlling interest imported that the control must be by virtue of a beneficial interest. The phrase in section 55 (1) "the deceased had the "control of the company" refers to voting control. To ascertain who has the voting control it is necessary to look at the share register. The question is whether the deceased had control within subsection (1) or (3). The purpose of subsection (3) is to bring within the scope of the section the case where the deceased, while not himself the shareholder, could control the voting powers; for example, where shares stood in the name of his nominee or in that of some person under a contractual obligation to vote as the deceased might direct. In such a case, the deceased would be deemed to have control, although he had not voting control within subsection (1) (*a*). Subsection (5) of section 58 cancels the provisions of subsection (5) of section 55 with regard to control in a fiduciary capacity, since the deceased settled himself the shares of which he was a trustee. If the judge were right a deceased could never control a company in a fiduciary capacity unless he was the sole trustee. The judge has held that one must leave out of account the votes of a trustee subject to the direction of other persons. Subsection (5) of section 58 would then only apply to a sole trustee. This construction would result in evasion of estate duty by a deceased by means of a settlement.

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[4] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49.

There is nothing in section 55 which would justify placing on the phrase "control of the company" any other meaning than that which has been placed on it in the decisions where the meaning of "control" or "controlling interest" has been considered in connection with other taxing statutes. In the two cases where the meaning of "control" was considered before the passing of the Finance Act, 1940, *B. W. Noble Ltd.* v. *Inland Revenue Commissioners*[5] and *Himley Estates Ltd. and Humble Investments Ltd.* v. *Inland Revenue Commissioners*,[6] "control" was construed as voting control. Since the Act of 1940 came into operation the House of Lords had held in the *British American Tobacco* case[7] that "control" and "controlling interest" meant voting control. In *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*,[8] it was held that in section 13 (3) and (9) of the Finance (No. 2) Act, 1939, in connection with the computation of standard profits, "controlling interest" meant voting control. There control was in part given by a holding of trust shares. There must be something in the facts to displace that prima facie meaning as there was in *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*.[9]

Inland Revenue Commissioners v. *Silverts Ltd.*[10] shows that

[5] (1926) 12 T.C. 911.

[6] [1933] 1 K.B. 472; 48 T.L.R. 341; 17 T.C. 367.

[7] [1943] A.C. 335.

[8] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[9] (1950) 29 T.C. 475.

[10] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

one must first ascertain who has control of a company and then see if he has control under a trust made by himself. *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [11] was concerned with the case where the controlling shares were held by another corporation and it was necessary to see who controlled that corporation. The decision is no authority for going behind the register. It is submitted that the deceased had "the control of the company" within the meaning of subsection (1) of section 55.

Alternatively, it is contended that he must be deemed to have had control within subsection (3) of section 55. Subsection (3) extends the meaning of control to cover the case where the deceased had power to control the voting powers of some other or where he was the managing director or could appoint the managing director. Subsection (3) is not an interpretation section, it extends the operation of subsection (1). The effect of a deeming provision was considered in *In re Parsons.*[12]

E. Blanshard Stamp following. If subsection (3) is a definition section, it covers the deceased's shareholding as trustee.

B. L. Bathurst Q.C. and *Denys B. Buckley* for the plaintiffs. It is submitted, first, that the deceased never had control of the powers of voting within section 55 (1) (*a*), since he could not exercise the votes in respect of the trust shares unless all his co-trustees were unanimous: Lewin on Trusts, 15th ed., p. 364. If the trustees were not in agreement as to how the votes in respect of the trust shares should be used, either the right to vote could not be exercised or the votes would have had to be exercised pursuant to the directions of the court. If the first trustee votes, the voice which is heard is the unanimous voice of all four trustees. If they are not unanimous that voice is silent. The deceased did not control "the powers of voting" within subsection (3) (*a*). The second submission is that subsection (3) is a defining provision and not an extending provision. There is no other definition of "control of a "company" in the Act. If it is an extending provision, it is necessary to exhaust subsection (1) before having resort to subsection (3) as in the case of sections 1 and 2 of the Finance Act, 1894. The questions then are, did the deceased have control within subsection (1); if not, must he be deemed to have had control? The authorities are on the wording of different statutes, and are concerned with the meaning of the expression "controlling "interest." The deceased here never had control, since he could not vote unless he first obtained the consent of three other persons, his co-trustees. The deeming provisions of subsection (3) (*a*) are merely an interpretation section: *Himley Estates* case.[13] Section 58 (4) supports the plaintiffs' contention, as do the observations of Lord Radcliffe in *St. Aubyn* v. *Attorney-General (No. 2)*.[14] The construction put by the Inland Revenue on these provisions leads to impossible results which the court should strive to avoid. Subsection (5) of section 58 applies to the case where the settlor is the sole trustee. The third submission is that since section 55 increases liability to estate duty, if there is any doubt as to the meaning of this ill-drawn section, it should be resolved in favour of the taxpayer: see the observations of Lord Atkin in *Liversidge* v. *Anderson.*[15]

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[11] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612; 37 T.C. 517.

[12] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

Fourthly, if, contrary to plaintiffs' submission, subsection (3) (*a*) extends the meaning of subsection (1), the deceased had not the control of the powers of voting. That control was vested in fact in all four trustees. Under article 61 of Table A, the other trustees also had powers of voting if the senior trustee did not vote.

With regard to the authorities, the *Bibby* case [16] was concerned with excess profits tax. It dealt with the taxation liabilities of a company and not, as here, of an individual. That is the fundamental distinction between the authorities cited and this case. The *Silverts* case [17] dealt with profits tax legislation. The main question there was how to reconcile the *Bibby* case [16] with the *British Tobacco* case,[18] and it was held that for the purposes of control it was not permissible to look outside the share register. Here the court is not asked to look outside that register. The *Berendsen* case [19] was also concerned with profits tax, as was the *Shields* case.[20] The articles of the company in question in the *Shields* case [20] were unusual. There the first named of joint holders was deemed to be the sole owner. The person so named was not a director of the company. The decisions on the meaning of a director's "controlling interest" have nothing to do with this case. They were concerned with profits tax or excess profits tax, and in each the question was whether a director had a controlling interest. The provisions of the relevant Acts there considered are not similar to those of sections 55 and 58. Those earlier authorities should not be lifted out of their context and applied to this statute.

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[13] [1933] 1 K.B. 472.

[14] [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

[15] [1942] A.C. 206, 245; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[16] 29 T.C. 167.

[17] [1951] Ch. 521.

[18] [1943] A.C. 335.

[19] [1958] Ch. 1.

[20] 29 T.C. 475.

Denys B. Buckley following. Subsection (3) (*a*) is expository of the provisions of subsection (1). Lord Radcliffe's exposition of the meaning of the word "deemed" in the *St. Aubyn* case [21] shows the approach to a "deeming" provision. If this subsection is not a definition provision the results might be uncertain. Suppose the deceased had been the second person named on the register, then, if for one day within the five years before his death he had had the voting power by reason of the first-named trustee being ill, the liability of his own shares to estate duty would be affected. Such a fanciful result suggests that the Crown's construction is not the right one.

John Pennycuick Q.C. in reply. Subsection (3) (*a*) of section 55 expands the meaning of control in subsection (1). On the ordinary meaning of words the deceased had control of this company. Alternatively, if subsection (3) is a definition section, then one must look at the matter from the point of view of the company or of the trustees. From the point of view of the company the only voice this company heard was that of the deceased to the exclusion of the voices of the other trustees. It is nihil ad rem that he might not have voted. The fact that the other trustees had control in a fiduciary capacity did not concern the company. The *Shields* case [22] is directly in point. If it is a definition section, then control means right to vote which the deceased had. Having regard to the decision in the *Bibby* case [23] the fact that that right is subject to the control of some third person is not material. Subsection (4) also applies so that the deceased had control.

Cur. adv. vult.

July 21. The following judgments were read.

LORD EVERSHED M.R. The plaintiffs in this action are the personal representatives of one, Tom Shipside, who died on December 15, 1955. The assets of the deceased's estate included 1,100 fully paid shares of £1 each in the capital of a company, T. Shipside Ltd., formed in the year 1917 to acquire the motor business formerly carried on by the deceased. The share capital of the company was and is £10,000, divided into 10,000 shares of £1 each, carrying the right, upon a poll, of one vote per share at general meetings of the company. The issued share capital was at all material times, and is, £8,350. The company's regulations include clause 61 of Table "A" in the Companies (Consolidation) Act, 1908, whereby, in the case of joint holders of shares "the vote of the senior who tenders a vote, whether "in person or by proxy, shall be accepted to the exclusion of "the votes of the other joint holders; and for this purpose "seniority shall be determined by the order in which the names "stand in the register of members." The deceased was a director of the company from the date of its incorporation until the date of his death.

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[21] [1952] A.C. 15.

[22] 29 T.C. 475.

[23] 29 T.C. 167.

In addition to the 1,100 shares registered in his sole name, of which he was, admittedly, the beneficial owner, his name also appeared first on the register as joint holder with (since 1948) the names of three other persons of a further 3,650 of the company's shares. These 3,650 shares are the subject of a settlement made by the deceased on December 1, 1936, in favour of his wife and three children (to the exclusion of any beneficial interest in himself). By the settlement he had the power during his life of appointing new trustees—a power which he exercised in 1948.

It will be noted that the 3,650 shares, plus the deceased's own 1,100, together amount to a majority of the issued shares of the company; so that if he exercised his voting rights, under the company's regulations, as "senior" registered holder of the 3,650 shares and as sole proprietor of his own 1,100 shares, he would command a majority of all the votes at general meetings of the company. In these circumstances, the question has arisen whether it should now be held that at any time during the last five years of the deceased's life he was "in control" of the company within the meaning of section 55 of the Finance Act, 1940: for, if so, it must follow that his own 1,100 shares in the company must be valued for estate duty purposes, not according to their value in the market pursuant to section 7 of the Finance Act, 1894, but according to the value of the company's assets as provided by the Act of 1940. It is this question of the proper basis of valuation which is posed for the court by the originating summons, and which Danckwerts J. answered in a sense favourable to the plaintiff executors. It is to be noted, as Mr. Bathurst for the plaintiffs observed, that an answer favourable to the Crown may have the added effect of so increasing the value of the estate as to raise also the general rate of estate duty payable in respect of it.

The problem turns entirely upon the true interpretation of the relevant provisions of the Finance Act, 1940.

[His Lordship read section 55 (1), (3) and (5) and section 58 (4) and (5) and continued:] It is easy, and perhaps not profitable, to criticise the draftsmanship of an Act of Parliament; but the inelegance and obscurity of some, at any rate, of the relevant provisions of the Act of 1940 is certainly remarkable, and in this respect section 58 (4) undoubtedly takes pride of place. Nevertheless, it is a mistake to suppose that, to the draftsman of this Act, the phrases "control of the company" or "con-"trolling interest in the company" had acquired the precise significance which later judicial pronouncements in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[1] and other cases have given them. In 1940, only Rowlatt J., in *B. W. Noble Ltd.* v. *Inland Revenue Commissioners*,[2] had anticipated the law, as later laid down, when he said that the phrase "controlling interest" in regard to a company was a reference to the situation of one "whose shareholding in the company is such that he is the "shareholder who is more powerful than all the other share-"holders put together in general meeting"; for on this point I do not think the decision of this court in *Himley Estates Ltd. and Humble Investments Ltd.* v. *Inland Revenue Commissioners*[3] is relevant. In that case the question for the determination of the court was whether the company then under consideration was to be treated as being under the control of not more than five persons within the meaning of subsection 6 (*d*) of section 21 of the Finance Act, 1922. The voting shares were held by 14 persons, all of whom were admittedly beneficial owners of their shares. But it was said on behalf of the Crown that they were nonetheless friends (though not relatives or nominees) and supporters of the tenant for life, Lord Ednam, and that the case fell, therefore, somehow within the language (the "ridiculous" language, according to one member of this court) of the definition at the end of the subsection, "a company shall be deemed to be "under the control of any persons where the majority of the "voting power or shares is in the hands of those persons or "relatives or nominees of those persons, or where the control is "by any other means whatever in the hands of those persons." The debate before Rowlatt J. and this court was substantially directed to the interpretation of that special formula, quite different from anything found in the Act of 1940.

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[1] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[2] (1926) 12 T.C. 911, 926.

[3] [1933] 1 K.B. 472; 48 T.L.R. 341; 17 T.C. 367.

It follows then, if I am right so far, that the draftsman, in using the phrase in section 55 (1) (*a*), "control of the "company," would not, or at least may well not, have intended by it what a draftsman in 1959 would intend. In the absence of judicial interpretation "control of the company" is a somewhat wide phrase. This consideration leads me, therefore, to the view that subsection (3) was intended as a definition or exposition; and this view seems to be supported by the return, in subsection (5), to the phrase "control of a company"—for I feel it difficult to suppose that subsection (5) was only intended to apply to subsection (1) cases and not to subsection (3) cases. My view is also, I think, supported—as Mr. Pennycuick conceded—by the reference to subsection (3) in section 58 (4). If "control of a company" in subsection (1) was thought to have a precise but limited meaning, which subsection (3) was intended to expand, I should have expected subsection (3) to say "In "this section the phrase 'control of a company' shall be "deemed to include . . ." etc., or words to that effect.

But in the end, it may not very much matter. Mr. Bathurst conceded that the phrase in subsection (3) (*a*), "control of "powers of voting," etc., would cover the ordinary case of a majority shareholder entered in the register. As Lord Radcliffe indicated in *St. Aubyn* v. *Attorney-General* (*No. 2*),[4] the effect of a "deeming" clause may be to cover both the obvious and the not-so-obvious.

In my view, the difficulty in subsection (3) (*a*) is caused by the words "powers of." What is really meant by the phrase "control of the powers or voting" is surely no more than "the "control of voting": perhaps "rights" would have been a better word than "powers." What, however, I think the words were intended and are apt to cover is the person who can, either by the direct exercise of the voting power or rights that he has, or indirectly by requiring such power or rights to be exercised as he wants by others, command, or produce the result, that the majority of the votes will be given as he wishes. It covers the absolute owner of 51 per cent. of the (voting) shares: it covers also, to my mind, the beneficial owner of 51 per cent. registered in the name of a nominee.

One result of this view may be that, in the contemplation

[4] [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

of the section, more than one person may have "control of a "company" within the section at the same time. This indeed is made clear by subsection (3) itself, for example, where A owns beneficially 51 per cent. of the shares, but B is the governing director (see paragraphs (*a*) and (*b*) of the subsection)—for the argument is not affected by the later repeal of paragraph (*b*). Similarly, a custodian trustee and managing trustee might both have "control." The latter point is, however, not likely to be of much practical significance having regard to subsection (5). The relevance for present purposes is that, in construing the section, the fact that "control" is, within the meaning of the section, found to be in one person, does not impliedly negative "control" also in someone else. After all, the section is not concerned to regulate companies, but to tax the estates of people whose interests in a company have a certain proprietary quality.

I therefore conclude that the section applies prima facie, and subject to exclusion under subsection (5), to a person who was, during the relevant period, in a position, by virtue of the voting rights vested in him, to secure the passing of any ordinary resolution at a general meeting. The next question then arises, is the prima facie result altered if it is shown that a relevant number of the shares, whose votes he was able and entitled to cast, were registered in him jointly with others as a trustee or otherwise? I assume in posing the question that subsection (5) has no application, and since, for the purposes of this case, it is conceded that subsection (5) cannot help the plaintiffs, having regard to the fact that Mr. Shipside himself made the trust disposition (see section 58 (5)), I shall disregard the possible application of the former subsection to this case.

Danckwerts J. thought that the question posed should be answered affirmatively. His grounds, briefly, were (and they are those submitted by the plaintiffs): (1) it is clear, for example, from subsection (5) of section 55, that you must go beyond the company's constitution and inquire of the capacity in which the registered shareholder in fact held his shares; and (2), when you find that the person entitled or primarily entitled to vote is one of four trustees, then it follows that he is speaking not with his own voice but with the united voices of all four trustees; it therefore follows that Mr. Shipside, though first on the register, was not voting the trust shares for himself and for his own purposes (as he was in respect of his own 1,100 shares): he was voting those shares on behalf and in the interests, to the exclusion of his personal interest, of the four trustees as a body. It was therefore said (and held by Danckwerts J.) that the present case was outside the scope of the relevant authorities, particularly *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[5] in the House of Lords; the two cases in this court, *Inland Revenue Commissioners* v. *Silverts Ltd.*[6] and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners*[7]; and the case before the First Division of the Court of Session in Scotland in 1950 (which was expressly approved by this court in the *Silverts* case[8]), namely, *John Shields & Co.* (*Perth*) *Ltd.* v. *Inland Revenue Commissioners.*[9]

I have, for my part, reached a different conclusion from Danckwerts J. and I can state as follows the grounds for my conclusion:

(1) Although the *Bibby*[10] and other cases (above referred to) were decisions on somewhat different contexts and related to the tax liability of companies and not of individuals, nevertheless, the speeches and judgments in those cases seem to me to have laid it down as a clear general proposition of law that control of a limited liability company depends upon, and is to be judged by reference to, the company's own constitution. I do not repeat the citations which Danckwerts J. made in his judgment, but, in my view, the general proposition has been affirmed with increasing emphasis as one case has succeeded another. What the company, being a "persona ficta," does or does not do is determined by the resolutions of its corporators, so that those who command a majority of the corporators or their votes in general meeting, control the company, the validity of the transactions of which cannot be questioned so long as the resolutions have been duly passed in accordance with the company's regulations—however much those who voted may have regarded or disregarded other (outside) obligations resting upon them. "A clean cut" (said Viscount Simonds in the *Bibby* case[11]) "there must be." It is nihil ad rem that the control of the company may be in the hands of persons who are themselves controlled from without. The company is in this respect like a motor-car the speed and direction of which is controlled by the driver—notwithstanding any influence or encouragement to which the driver is subject from other passengers.

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[5] 29 T.C. 167.

[6] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.

[7] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612; 37 T.C. 517.

[8] [1951] Ch. 521.

[9] (1945) 29 T.C. 475.

[10] 29 T.C. 167.

[11] Ibid. 185.

(2) In the absence, therefore, of some compelling context to the contrary, the court must respect the general rule binding upon it; and it should avoid making fine distinctions. In my judgment there is no such compelling context in section 55 of the Act of 1940. For reasons which I have earlier attempted to state, other persons than the majority shareholder may well also, under the section, be deemed at the same time to control the company: and in this connection I refer to the last three lines of subsection (3) of the section. But these other "controllers" (if such there be) do not displace the control of the man who, according to the company's regulations, secures by his votes the passing of the resolutions—any more than the "control" of a motor-car by the driver is displaced by the fact that he may be acting under the influence and orders of a passenger who might therefore also be sensibly alleged to be in "control."

(3) It is true that, as Danckwerts J. pointed out, you are required by section 55 (5) to look into the character of the shareholder to see whether he is a trustee. But I observe that that subsection in terms affirms, rather than negatives, the trustee's "control." The subsection does not say that a majority shareholder, who is a trustee, shall not be deemed to control the company; it says rather that the control which the trustee has is to be disregarded. Further, if Mr. Bathurst's argument were accepted, the subsection can, as he concedes, only apply to a sole trustee—a result which seems to me, to say the least, to be an unlikely intention.

(4) If I am right so far, then the only remaining question is whether the facts that the deceased, as the "senior" of the four trustees, had, by virtue of clause 61 of Table "A," only a prior right of voting quoad the other trustees, and that, when he voted, he must be taken to have spoken with the voices, in unison, of all four trustees, make any difference. It is true that these facts did not precisely arise in any of the decided cases; but in my opinion we should not on that ground distinguish this case from the Scottish case of *Shields*,[12] which has been expressly approved in this court. It is true that under the relevant article in the *Shields* case [12] Mrs. Bell had more than mere priority—she was to be treated as the sole proprietor of the trust shares. But, like the deceased, she had still to attend and vote; and like him, if (as we must assume) she performed her trust duties properly, she spoke with the voice of all the trustees.

In my judgment, therefore, we ought, in conformity with the principles of law binding upon us, to hold that the Crown has in this case discharged the onus which rests upon it of showing that the deceased, during the relevant period, was (by virtue of the 3,650 shares registered in the names of himself and his three co-trustees—his own name being first on the register—and of the 1,100 shares of which he was the registered proprietor and beneficial owner) "in control of the company" within the meaning of section 55 (1) and (3) of the Act.

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[12] 29 T.C. 475.

Mr. Bathurst argued that on this view anomalies would arise, of which he gave examples. It may be that some anomalies do arise, upon my view of the construction—and on sections worded as are these, it would be perhaps surprising if it were not so. But I do not think that my construction involves anomalies so striking as to require that construction to be rejected.

Finally, I am also not satisfied that acceptance of the Crown's argument involves a manifestly unjust result or one which is contrary to the apparent intention of Parliament. The deceased was without doubt closely connected with the business of the company which bears his name. Immediately before the making of the settlement he appears to have held in his own right 4,750 shares out of an issued total of 8,350, or approximately 57 per cent. At that time he undoubtedly "controlled the company." He appears also to have been at all times a director. I have also referred to the fact that by the terms of the settlement he gave himself the power (which he exercised eight years after the passing of the Act of 1940, retaining his own place as first on the register) to appoint new trustees. It is no doubt a misfortune for his estate that the deceased on making the settlement, or thereafter, forbore from putting the name of one of the trustees other than himself first on the register. But he did not do so. It appears to me at least highly likely that the conduct and management of the company's affairs remained (and may even have been intended to remain) after the settlement exactly the same as it had been before.

I add that I am glad to be able to reach the conclusion that I do without recourse to the almost offending language of section 58 (4). As regards that subsection, I content myself by saying that, as at present advised, I am inclined to agree with Mr. Bathurst that its terms are not apt to apply to the circumstances of the present case. I have also not found it necessary to do more than refer to section 58 (5), since it was (as I have earlier stated) conceded before us that so far as the deceased was concerned, the subsection effectively disqualified the plaintiffs from invoking subsection (5) of section 55.

For the reasons which I have stated, I would allow the appeal and answer the question raised by the originating summons in the sense of paragraph 1 (a).

Pearce L.J., who is unable to be present today but who has seen the draft of the judgment which I have delivered, has authorised me to say that he agrees with it.

ROMER L.J. I agree with the Master of the Rolls and Pearce L.J. in thinking that this appeal should be allowed, but as I have reached that conclusion by a somewhat different road, and as we are differing from the judge, I will add a few words of my own.

For myself I incline to the view that if a case be found to come within subsection (1) of section 55 of the Finance Act, 1940, it is unnecessary to look further and, in particular, it is irrelevant to inquire whether the case falls within the terms of subsection (3) of the same section. In other words, it seems to me that the " deeming " provisions of subsection (3) are supplementary to, or expansive of, subsection (1), and are not merely expository thereof. I think that subsection (1) is dealing with direct control of a company, whilst subsection (3) is concerned with indirect control. If subsection (3) were merely expository of subsection (1), it must at least be assumed to cover the case of a registered beneficial owner, but such an owner does not easily fit into the words " the control of powers of voting on all questions." These words in their natural sense would seem to indicate control of powers vested in some third person, as distinct from the exercise of powers which are vested in a registered owner himself—a distinction which is recognised in terms in subsection (3) (*b*). I feel that if subsection (3) had been intended to be an exhaustive definition of what constituted " control of a company " for the purposes of section 55 the draftsman would have used wider language in subsection (3) (*a*), such as " the powers of voting or " the control of powers of voting," etc. It is true that section 58 (4) tends to the opposite view to that which I have expressed, but that subsection is drawn in such a bewildering manner as to be an unsure guide to the interrelation of subsections (1) and (3) of section 55. I find some support for the construction of these subsections which appeals to me from the approach of Lord Greene M.R. to a somewhat similar question in *In re Parsons*.[13]

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[13] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

On the footing, then, which I have indicated, the first question to consider is whether the Crown have succeeded in establishing that the deceased had the control (within the meaning of section 55 (1)) of T. Shipside Ltd. at any time during the relevant period before his death.

The Master of the Rolls has stated the material facts of the case and I do not repeat them. The answer to the question which I have posed depends upon whether the shares comprised in the settlement which this gentleman made in 1936, and in respect of which he and his co-trustees were at all material times on the company's register, are relevant to the issue. His name appeared first on the register in respect of the joint holding of these shares, and it is the Crown's contention that this fact, combined with his own beneficial holding, gave him control of the company at and prior to his death. The contrary view, accepted by Danckwerts J. and advanced before us by Mr. Bathurst and Mr. Buckley, is based upon the contention that no regard should be had to the settled shares in considering whether the deceased had control of the company.

Now the precise words " the control of the company " which appear in section 55 (1) have not been judicially interpreted in any decision binding upon this court. The words " controlling " interest," however, have been considered in more than one case, including *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*,[14] which was a decision of the House of Lords. The cases in question were concerned with other statutes and dealing with other issues than those which arise under the Finance Act, 1940, s. 55; but it appears to me that the result of the decisions is that where Parliament speaks in a taxing statute of a " con- " trolling interest " in a company, that expression is referable to voting control and to nothing else. If so, I am unable to attribute a different meaning to the words " control of a com- " pany "; and, accordingly, the control of a company is in the hands of the person (if any) whose holding carries a majority of votes. " The control of a company," said Lord MacMillan in *Bibby's* case,[15] " resides in the voting power of its shareholders." Nor does it matter that the shares, which confer the voting power, are held by a trustee. " The trustee, like the beneficial owner, " controls ": *per* Lord Porter.[16] Nor, as was pointed out by

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[14] 29 T.C. 167.

[15] 29 T.C. 167, 181.

[16] Ibid. 184.

Lord Simonds [17] in the same case, is it material that the trustee has to pay regard to the wishes of others. "Those" (he said) "who by their votes can control the company do not the less "control it because they may themselves be amenable to some "external control."

Prima facie, then, if the deceased had been the sole trustee of the settlement and the shares comprised therein had been registered in his name alone, it could, I think, hardly be contended that the voting power so vested in him should be disregarded in an inquiry whether or not he had control of the company. And, indeed, as the Master of the Rolls has pointed out in his judgment, section 55 (5) inferentially recognises that control of a company may be in the hands of a person who holds shares as trustee for third parties. But the plaintiffs' argument in the present case is based upon the fact that the deceased was only one of four trustees; that any decision of two or more trustees must be unanimous; and that, accordingly, the vote and voice of the deceased at a meeting of the company were those of the trustees as a body and not the personal vote and voice of him as an individual. True it is, said Mr. Bathurst and Mr. Buckley, that by reason of article 61 of Table "A" of the Companies Act, 1908, the vote of Mr. Shipside, as the first of the joint holders on the register, was accepted to the exclusion of the votes of the other trustees; but the fact remains, and should be recognised by the court, that Mr. Shipside's vote was the vote of the trustees as a whole and that each trustee had an equal say as to the manner in which that vote should be cast. It seems to me that this argument seeks to apply by analogy the decision of this court in *S. Berendsen Ltd.* v. *Inland Revenue Commissioners*,[18] in which it was held that, where a registered shareholder was a body corporate, it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate. In the course of his judgment in that case, my Lord, the Master of the Rolls, said [19]: "Where the registered "shareholder is a body corporate you nevertheless may, and "indeed must, for certain purposes, look beyond the register; "for since the company cannot itself speak you must find out "with whose voice it must do so. You may therefore ask, who "does control the body corporate by the necessary shareholding "interest in it?"

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[17] 29 T.C. 167, 184, 185.

[18] [1958] Ch. 1.

[19] Ibid. 38.

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The plaintiffs say that it is not even necessary to look beyond the share register of T. Shipside Ltd., for the names of all the trustees appeared upon it; but that it is clear that the voice of the deceased was that of the body of the trustees, which (by reason of article 61 of Table "A") could no more speak as such than could an incorporated body. In my opinion this contention must be rejected for three reasons: In the first place it necessarily involves the view that section 55 (5)—as qualified by section 58 (5)—was directed only to cases in which the majority voting power in a company is in the hands of a sole trustee of a settlement to the exclusion of the far more common case of settled shares being held by two or more trustees. I find it difficult in the extreme to suppose that this can have been the intention of the legislature. Secondly, there is no true analogy, in my judgment, between the position of the deceased and his co-trustees on the one hand and a corporation on the other. It was of the essence of the decision in *Berendsen's* case [20] that a corporation is unable itself to speak, which cannot be said of a body of individuals, and I do not think that the limiting provisions of article 61 are sufficient to constitute an analogy. Thirdly (and possibly of most importance), the plaintiffs' contention is, in my judgment, inconsistent with the decision of the Court of Session in *John Shields & Co.* (*Perth*) *Ltd.* v. *Inland Revenue Commissioners*,[21] which was approved by this court in *Inland Revenue Commissioners* v. *Silverts Ltd.*[22] In that case the majority of shares in a company consisted of a trust shareholding of which there were four trustees. One of the articles of association of the company provided, so far as relevant, that "if two or more persons are registered as joint "owners of any shares any one of them nominated in writing by "them all from time to time, or in default of such nomination "the person first named on the register in respect of such shares, "shall, as regards voting . . . be deemed the sole owner." No such nomination as that mentioned in the article was made. There were four trustees on the company's register in respect of the trust holding, and, of these, a Mrs. Bell was named first in the register. Other points arose in the case to which it is not, for present purposes, necessary to refer, but the court held that the controlling interest in the company resided in Mrs. Bell. The plaintiffs' submission in the present case, as applied to

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[20] [1958] Ch. 1.

[21] 29 T.C. 475.

[22] [1951] Ch. 521.

Shields' case,[23] would have resulted in a decision that the controlling interest in the company was vested in all four trustees and not in Mrs. Bell alone. It is true that in *Shields'* case,[23] having regard to the article which I have quoted, unless Mrs. Bell attended a meeting of the company and voted, the voting power conferred by the trust holding could not be exercised at all and that that would not be the position under article 61 of Table "A," but in my opinion that is a distinction without a difference. The essential fact is that the voting control was held to reside in Mrs. Bell, notwithstanding that as a trustee she could only properly record a vote with the unanimous concurrence of her co-trustees and that in that sense her own voice was the voice of them all. Mr. Bathurst suggested that if the deceased had stayed away from a meeting of the company, or had attended but refrained from voting, the trustee whose name next appeared on the register could exercise the voting power conferred by the settled shares and that such power was accordingly not vested in the deceased exclusively. I think that the answer to that is that control of a company may well exist in a person even though he may, on occasion, choose not to exercise it; and, in any case, so far as I am aware, there is no suggestion made that the deceased did not at any time during the five years which preceded his death exercise the voting power himself.

Accordingly, I am of opinion, for the reasons above stated, that on the facts of this case it falls within section 55 (1), and regard need not be had to the provisions of section 55 (3). If, however, I am wrong in thinking that subsection (3) of section 55 is not merely expository of subsection (1), I would agree that in the end the same result follows, for the reasons which the Master of the Rolls has stated in his judgment.

In conclusion I would only add that, except to the extent that section 55 does or may operate harshly (a question with which we are not concerned), I cannot regard the present case as one of any special hardship. For the deceased, in settling the shares in question, took good care to see that, during the lifetime of his wife, the voting powers attaching to such shares remained in his own control, so that he could continue to exercise the same influence over the conduct and management of the company's affairs as he had done previously. Moreover, by clause 8 of the settlement of 1936 he expressly reserved to himself during his life

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[23] 29 T.C. 475.

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the power to appoint new trustees, a power which he in fact exercised when one of the original trustees retired in 1948.

I agree that the appeal must be allowed.

Appeal allowed. Respondents to pay party and party costs here and below. Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Gibson & Weldon for J. & A. Bright, Nottingham.*

B. A. B.

BAINES *v.* TWEDDLE.

[Plaint 1956 B. No. 80.]

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June 16, 17.

Lord Evershed M.R., Romer and Pearce L.JJ.

Vendor and Purchaser—Defective title—Right to rescind contract—Law Society's General Conditions of Sale—Power for vendor to rescind—Agreement for sale of unincumbered fee—Property subject to mortgages—Failure of vendor to obtain consent of mortgagees to sale before contract—Refusal of mortgagees to release security—Vendor not entitled to rescind.

A vendor agreed to sell certain freehold land to a purchaser. The contract incorporated the Law Society's Conditions of Sale, 1953, which by condition 10 (1) provide: "If a purchaser takes "or makes any objection or requisition as to title, conveyance or "otherwise which the vendor is unable or, on the ground of "unreasonable expense, unwilling to remove or comply with, and "does not withdraw the same within ten days after being required "in writing so to do, the vendor may . . . rescind the contract by "notice in writing delivered to the purchaser or his solicitors."

At the date of the contract the land was, together with other land, subject to a first mortgage to a building society and to a second mortgage. The vendor did not, before he signed the contract to sell, inquire of the mortgagees whether they would concur in the sale but he did ask his solicitor to communicate with the building society. At the time of the signing he inquired as to the position and was told that his solicitor "had the matter in hand." The vendor knew that his solicitor had not then in fact communicated with the society. The vendor was in arrear with the instalments payable under the mortgage and the society refused to concur in the sale. The purchaser having refused to take a conveyance of the property subject to the mortgages, the vendor served a notice under condition 10 purporting to rescind the contract. The purchaser claimed specific performance or, alternatively, damages:—

Held, assuming that for the purposes of this contract that the purchaser's objection was an objection within condition 10 of the Law Society's General Conditions, 1953 (observations of Collins M.R. in *In re Jackson and Haden's Contract* [1906] 1 Ch. 412, 422, and of P. O. Lawrence J. in *Merrett* v. *Schuster* [1920] 2 Ch. 240, 255, considered), that, while on its face condition 10 appeared to be unqualified in its terms, it was nevertheless subject to the qualification that the vendor must not have been guilty of conduct which, while falling short of fraud or dishonesty, might be described as reckless; and that, on the facts, the vendor had been reckless in signing the contract without being certain that his mortgagees would concur in the sale and, accordingly, he was not entitled to rescind the contract under the power conferred by condition 10.

In re Jackson and Haden's Contract, supra, followed.

Quaere, whether a vendor could rely on condition 10 if his own solicitor had recklessly assured him that the necessary consents of the mortgagees had been obtained, when they had not.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

By an agreement in writing, dated August 29, 1955, and made between the defendant William Tweddle, as vendor, and the plaintiff John William Baines, as purchaser, the vendor agreed to sell to the purchaser a freehold plot of land, being plot 422, comprising 5·808 acres known as "Low Dormerstiles," situate at Heighington, Durham, for £580. That agreement incorporated the Law Society's Conditions of Sale, 1953, which by general condition 10 (1) provided: "If a purchaser takes or "makes any objection or requisition as to title, conveyance or "otherwise which the vendor is unable or, on the ground of "unreasonable expense, unwilling to remove or comply with, "and does not withdraw the same within ten days after being "required in writing so to do, the vendor may . . . rescind the "contract by notice in writing delivered to the purchaser or his "solicitors."

At the time when the vendor signed the contract the property, together with other property, was subject to a first mortgage dated May 13, 1952, to the Darlington Building Society to secure £3,500 and interest and to a second mortgage dated March 27, 1953, to Solomon Abrahams to secure the sum of £600 and interest. At the date of the contract the vendor was in arrear with the instalments payable to the building society. When the

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sale was in course of negotiation the vendor instructed his solicitor to get in touch with the building society about the sale. Before he signed the contract he asked the solicitor's clerk whether the building society would consent, and he was told that his solicitor "had the matter in hand." The vendor then signed. The purchaser paid a 10 per cent. deposit and on September 19, 1955, paid the balance of the purchase money into the joint names of the solicitors of the vendor and purchaser and went into possession.

The vendor could not induce the building society to join in the sale. The purchaser refused to accept a conveyance subject to the building society's mortgage and required the vendor to convey free from incumbrances. By letter of August 16, 1956, the vendor's solicitors required the purchaser to withdraw his objection within 10 days. The purchaser having failed to do so, by letter dated August 31, 1956, the vendor purported to rescind the agreement pursuant to the power conferred by condition 10 of the Law Society's Conditions of Sale.

By this action the purchaser claimed specific performance of the agreement for sale, alternatively, damages. The vendor by his defence alleged that when he entered into the agreement he reasonably believed that the society would join in conveying the property to the purchaser and he relied on the notice of rescission and counterclaimed for a declaration that such agreement for sale had been duly rescinded on August 31, 1956, and for possession. The purchaser had, before the appeal was heard, given up possession and no further question arose with regard to that part of the counterclaim.

Vaisey J. dismissed the purchaser's action, holding that the agreement had been rescinded by the vendor's notice under condition 10 and awarded to the vendor £100 agreed damages in respect of the purchaser's occupation.

The purchaser appealed.

The evidence is more fully stated in the judgment of Lord Evershed M.R.

John E. Vinelott for the purchaser. It is common ground that the land the subject of the agreement for sale was subject to two mortgages and that the vendor found it impossible to obtain their discharge. The purchaser is asking for specific performance of the agreement or, alternatively, for damages. Before the defendant delivered his defence he purported to exercise the power to rescind conferred by condition 10 of the Law Society's

Conditions of Sale (1953 ed.). The question raised by this appeal is whether the vendor was, in the circumstances, entitled to rescind. The purchaser was allowed into possession but his licence to occupy was subsequently rescinded.

If a vendor cannot complete without the consent of a third party, he cannot rescind under condition 10 unless, when he entered into the contract, he had reasonable grounds for believing that the third party would join in the conveyance. Such a reasonable belief can only exist if the third party has himself stated that he would join. This vendor is not entitled to rely on statements made by someone else, and especially not on statements made by his own solicitor.

The vendor was not entitled to rescind; he knew that the property was subject to two mortgages; he did not make the contract conditional on the mortgagees agreeing to discharge the property. Nor did he make any inquiries which would lead him to suppose that the mortgagees would be willing to concur in the sale. He only made inquiries of his own solicitor. The judge was wrong in treating the solicitor as if he were an independent person. He was the vendor's own agent, who was liable for what he did. What passed between the vendor and his own solicitor is not material. If the solicitor made no inquiries, the vendor had no reasonable ground for any belief he had that his mortgagees would join in the conveyance to the purchaser. In *In re Jackson and Haden's Contract* [1] it was held that where a vendor knows of a defect in his title and signs a contract to sell, taking a chance that he will be able to remove it, he cannot have the advantage of provisions giving to him power to rescind. A vendor is answerable for the recklessness of his own agent. [Reference was made to *Duddell* v. *Simpson*.[2]] It would be odd if a vendor could rely on his own solicitor's advice, when the solicitor had in fact made no inquiries of the mortgagees.

In *Merrett* v. *Schuster* [3] the vendor had good reason for believing that he could give vacant possession. There he stated what he believed to be true and he had substantial grounds for so believing. In the present case, by implication, the contract is to convey free from incumbrances. The question is whether the vendor in entering into this contract acted prudently. It is not enough for a vendor to be told by some third party that an incumbrancer will join in the sale to release the charge. The vendor must inquire of the person himself whose concurrence is required. In this case the vendor had no reasonable ground for believing that the mortgagees would concur in the sale. If the vendor is liable in damages to the purchaser, and that liability is due to the recklessness of his own solicitor, his remedy is in damages against such solicitor. If a vendor in a case such as this is entitled to rely on inquiries made by his solicitor, he cannot do so in this case, since no reasonable inquiries were made by the solicitor.

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[1] [1906] 1 Ch. 412, 422.

[2] (1866) L.R. 2 Ch. 102.

[3] [1920] 2 Ch. 240.

It is conceded that if the power of rescission was validly exercised, then the vendor is entitled to succeed on his counterclaim. [Reference was made to Megarry & Wade's Law of Real Property, p. 120; Williams on Vendor and Purchaser, 4th ed., p. 225; *Jared* v. *Clements*.[4]]

A. C. Sparrow for the vendor. There is no injustice in permitting the vendor to exercise his power to rescind. He informed the purchaser of the position at an early date. Condition 10 is very widely worded. In terms it covers this case. The vendor here took advice. He was not reckless, as was the vendor in *In re Des Reaux and Setchfield's Contract*.[5] The vendor has a legal right to exercise the power of rescission reserved to him by the contract, unless he is precluded from doing so by some equitable principle which operates on his conscience. A layman who employs a solicitor cannot question what the solicitor does. The vendor was entitled to ask his solicitor and to accept his answer that it was all right to sign the contract. He acted reasonably in signing the contract for sale. He was acting in good faith, as was the vendor in *Merrett* v. *Schuster*.[6] He had taken steps to verify the grounds of his belief. There is no suggestion that the vendor, when he signed, did not believe that he could complete. The purchaser must show positively that the vendor had no ground for that belief. That is a question of fact. The vendor may have displayed a want of prudence, but the purchaser must show more than that if the vendor is not to be entitled to exercise his right of rescission. There must be some conduct savouring of fraud or dishonesty.

Vinelott in reply. With regard to whether the vendor was entitled to rely on what his solicitor said, it is plain from the evidence that the vendor knew when he signed that the building society had not in fact been approached. The evidence does not

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[4] [1903] 1 Ch. 428; 19 T.L.R. 219.

[5] [1926] Ch. 178.

[6] [1920] 2 Ch. 240.

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show that anything was said about the second mortgagee at all. He was ignored. On the facts, the vendor is not entitled to take advantage of condition 10.

LORD EVERSHED M.R. This appeal, which has arisen in an action for specific performance of a contract for the sale of land, has raised some points of no little difficulty. The actual question, with which alone we must deal, may, however, be shortly stated: it is whether, in the circumstances, the defendant (the respondent), who was the vendor under the contract, was entitled to rescind that contract in the way in which, and at the time when, he did. It will be necessary to lay the foundation for what follows with some statement of the facts.

The contract was dated August 29, 1955, and it related to a piece of land, plot number 422, which was part of a larger area owned by the vendor; and it was required by the purchaser to be used by him in connection with his other land for agricultural purposes. The sale, judged by the purchase price, was not one of very great substance; for that price was £580, of which, in accordance with normal practice, £58 was paid by way of deposit. The property is described as: " All that close or parcel of ground " containing according to the ordnance map " a certain area which is identified on the plan " together with a right of way " and so on. Then: " Except and reserved unto the Church Com- " missioners for England their successors and assigns the mines " quarries and minerals in or under the said hereditaments," etc.; " and also except and reserved unto the vendor and his " successors in title and his or their servants workmen and others " authorised by him or them the right to enter the said close or " parcel of land " for limited purposes.

The contract, after stating the root of title, said further: " The property is sold subject to (a) a proportionate part of a " Tithe Redemption Annuity of £1.6.8." There was no statement of the nature of the interest which the vendor was to convey, but, in the circumstances, it cannot be doubted that the bargain was for the sale of the fee simple of the land, unincumbered, subject only to the reservations and qualifications which I have stated. Mr. Sparrow, for the vendor, has not contended—indeed he could not possibly have contended—otherwise.

At the time when this bargain was made the vendor had, in fact, executed two mortgages which affected this plot; the first was to the Darlington Building Society, and the total amount outstanding on the mortgage was £2,900-odd. Not only so, but it also emerged that the vendor had fallen into serious arrears with the instalments payable under that mortgage, five instalments then being outstanding, a total of some £105. In addition, there was a second mortgage or equitable charge on the property, and I assume (although I do not exactly know) other property also, for £600; that mortgage was in favour of one Solomon Abrahams. It will be appreciated that neither of these incumbrances was referred to in the contract and if, therefore, the vendor was to perform the contract according to these terms, it would be necessary for him either to discharge the mortgages (or discharge them as far as related to plot 422) or to procure the mortgagees and chargee to join in the conveyance to the purchaser.

I must finally state, because it is of great importance, that the situation between the vendor and the building society, namely, the fact that he was five instalments in arrears, was obviously one which he, in his own mind, thought might possibly make the building society not entirely amenable to every suggestion which he might make. It appears to have been in his mind, somewhat vaguely, that Abrahams would get a small percentage, and that the total purchase price to be received, namely £580, would go to the building society. To jump ahead in my introduction, it must be said that, when the building society were asked if they would assist the vendor by joining in the conveyance, they flatly refused, and from their refusal they have never since, so far as I know, resiled at all.

It is, I think, not entirely insignificant to state that the refusal of the building society to assist the vendor became, according to the pleadings, known to the vendor within a very few days after the contract, namely, on September 1. We were informed that the purchaser was told of this particular difficulty a month after the contract. But I note that on September 19 the vendor allowed the purchaser to pay the entire balance of the purchase price, which was put on deposit in the joint names of the two solicitors concerned, and the purchaser thereupon, in accordance with a clause in the conditions of the contract, went into possession. As things have turned out, I need not say anything more about that aspect of the case. I understand that it was an argument in the court below that, even though the vendor should be disentitled to rescind, he did rightly determine his licence to the purchaser to occupy the land, so as to give him the right to a claim for damages for trespass which is a subject-matter of the counterclaim; but, as it has now transpired, it can be taken that, if the right to rescind was not available, then no such right for damages subsists in favour of the vendor.

I must now turn to the contract to refer to the particular clause which gives rise to this question. There was incorporated into the contract the Law Society's Conditions of Sale, 1953. That is a substantial document, and clauses 8, 9 and 10 relate to the matter of "Abstract," "Requisitions" and "Power to "Rescind." In particular, clause 10 reads as follows: "(1) If "a purchaser takes or makes any objection or requisition as to "title, conveyance or otherwise which the vendor is unable or, "on the ground of unreasonable expense, unwilling to remove or "comply with, and does not withdraw the same within ten days "after being required in writing so to do, the vendor may "rescind" subject as therein stated "the contract by notice "in writing delivered to the purchaser or his solicitors." Subparagraph (2) deals with certain consequences to which I need not allude.

It became unfortunately, but quite clearly, manifest that this vendor would not be able to obtain the mortgagees' concurrence in the conveyance. It therefore followed that the best he could do by way of compliance with his bargain was to offer to the purchaser a conveyance of the equity of redemption, subject to the building society mortgage of nearly £3,000 and to Abrahams' second charge; in other words, he could not convey that which he had contracted to convey, namely, the unincumbered fee simple. Not only so, but instead of something which I assume would have been worth £580 or thereabouts, the equity of redemption, the subject of these charges, quite clearly would not be worth a penny piece. It is, therefore, not to be wondered at that the purchaser was unwilling to accept, as a completion of this bargain, a conveyance of the equity of redemption. Accordingly, after the passage of a good deal of time, when, I do not doubt, great efforts were probably made by the vendor to see if he could persuade the mortgagees to help, the vendor's solicitor wrote the letter which the condition requires, calling upon the purchaser to withdraw the objection within 10 days. It will be observed that, in order to bring himself within the condition, the vendor has to say that the purchaser is taking or making an objection to the title, conveyance or otherwise, and that if the vendor is unable or, for the reasons stated, unwilling to comply with the objection and thereupon calls upon the purchaser to withdraw it, then if the purchaser does not withdraw it, his contractual right to rescind arises.

I confess that I felt some doubt whether the situation which arose here between these two contracting parties fits within the scope of this condition at all. This, after all, was not in the ordinary sense an objection or requisition of the kind that arises when requisitions on title are delivered; it went to the root of the whole subject-matter of the contract. But I shall assume for the purpose of this judgment that since an incumbrance is clearly something affecting the title, it should be properly said that a refusal by the purchaser to accept a conveyance of the equity of redemption, instead of the unincumbered fee simple which the vendor had promised to convey, did constitute an objection within clause 10.

Upon that point I should, however, add this: We were referred—and it is, for present purposes, really the foundation of the case law on the whole subject-matter of this appeal—to the case in this court of *In re Jackson and Haden's Contract.*[1] In that case the vendor had contracted to sell to the purchaser a villa residence and the terms of the contract made it quite plain that he was contracting to sell the entire interest in the villa, and the land on which it stood, including mines and minerals thereunder. In point of fact, he did not have the mines and minerals; they had been reserved in the conveyance to the vendor and therefore he was quite unable to hand them on to the purchaser. He said that he thought it was a matter of such notoriety in the district that the mines and minerals were reserved that the purchaser knew it and was not expecting them. It was therefore a case in which he could not convey that which he had promised to convey, because he could not include the minerals. There was a rescission clause, comparable to that with which we are concerned, and Buckley J. had in the first instance, as I understand it, taken the view that the objection which the purchaser took to having the purchase conveyed sans minerals was not within the condition at all. In this court Henn Collins M.R., as I read his judgment, thought that prima facie it was. I felt, and I confess I still feel, some slight doubt in my mind whether Romer or Cozens-Hardy L.JJ. were as clear as the Master of the Rolls upon that point; but, however that may be, in *Merrett* v. *Schuster*,[2] heard by P. O. Lawrence J., he clearly expressed the view

[1] [1906] 1 Ch. 412.

[2] [1920] 2 Ch. 240, 255.

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that the scope given by Henn Collins M.R. to a condition of this kind should now be accepted. For the purposes of this case, therefore, I am willing to assume that the objection of the purchaser in this case was an objection within the scope of clause 10. It is clear that the necessary procedure was adopted within the terms of the condition, so that, if there is no other defect in the vendor's claim, he has exercised a contractual right of rescission.

On the face of this condition the right appears to be unqualified; if a purchaser takes or makes any objection which the vendor is unable, or, on the grounds of unreasonable expense, unwilling to remove, etc., then the vendor may rescind the contract. Naturally enough it has been the main burden of Mr. Sparrow's argument for the vendor that this was the bargain which the purchaser made. It gave the vendor this apparently unqualified right of rescission and the purchaser must, accordingly, accept the consequences. I only venture, by way of comment on that, to remind the vendor that he on his part contracted to sell an unincumbered fee simple and nearly three weeks after doing so allowed the purchase money to be paid into the joint account.

But this condition, which is one of considerable ancestry, though quite unqualified in terms, nevertheless has had a qualification undoubtedly imposed upon it by decisions of the court. I refer again to *In re Jackson and Haden's Contract.*[3] In that case the qualification was expressed first in this language by Henn Collins M.R.[4]: "As I have already said, numerous "cases have been most carefully set before us, which I have "had the opportunity of examining as they were read, and "it seems to me that, in every case where the vendor was "allowed to avail himself of a stipulation like this, there was "always absent that element of shortcoming on his part which, "though falling short of fraud or dishonesty, might be described "as 'recklessness.'" Romer L.J., at the end of his judgment, said,[5] quoting from the earlier case of *In re Deighton and Harris's Contract*[6]: "As Rigby L.J. said" in that case "it would not, "in my opinion, be right here to enable the vendor to 'ride off "'upon a condition to rescind which was obviously not framed "'with reference to any such case as' that which has arisen."

I should add that in *In re Jackson and Haden's Contract,*[7] the court came to the conclusion that the defendant could not rely upon this condition for rescission. In the present case, when the purchaser challenged the vendor's right so to rescind, the answer of the vendor was that at the time he signed this contract to convey the unincumbered fee simple he reasonably believed that the building society would be willing to join in conveying to the purchaser the property comprised in the agreement. I do not omit to notice that he did not think fit even to refer to any views which he held about Solomon Abrahams; but still that was his plea. No particulars were asked of it and he therefore set forth to prove that he did so reasonably believe. I think there may be no doubt that if, for example, he, the vendor, had before signing this contract been given an assurance of some sort by the building society—I will not refer again to Abrahams—that they would join in conveying this property and then the building society changed its mind, then on the authorities the vendor would be entitled to rely upon the power to rescind; in other words, I accept, in the language of the Master of the Rolls in *In re Jackson and Haden's Contract*,[7] that, if the vendor here is to be disabled for asserting his contractual right to rescind, he must be shown to have had that shortcoming, which, although not amounting to anything in the nature of dishonesty, could be described as recklessness. I must say at once—it is right that I should do so—that there is no shred of a suggestion that the vendor was dishonest or acted otherwise than in perfect good faith. What he said in support of his plea of reasonable belief was that he had asked his solicitor whether it would be all right and that he relied on what he understood to be the solicitor's assurance.

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[3] [1906] 1 Ch. 412.

[4] Ibid. 422.

[5] Ibid. 424.

[6] [1898] 1 Ch. 458, 464.

[7] [1906] 1 Ch. 412.

That raises another point of some difficulty. Assuming that the vendor was assured by his own solicitor, who was acting for him in the sale, that all would be well, is that necessarily sufficient for the purpose of the condition? To put the matter in its strongest form, supposing that the solicitor, though giving that assurance, was himself grossly reckless or (although it is not of course the case here) quite dishonest and the solicitor had not taken any steps at all about it or knew perfectly well that the building society would not join, what then is the position? If the matter were one in which the general law of principal and agent was in all respects applicable, there would obviously be a very strong case for saying that the vendor could not shelter behind his solicitor and that, if his solicitor is reckless, then he, as his solicitor's principal, must be regarded as reckless also; and our attention was directed to the case where a party to a contract, via a solicitor, may be held to have constructive notice of charges or other defects of title. Moreover, there may be on this matter a question whether the same result should necessarily apply if the agent, whose advice was sought, was not a solicitor but was, say, a bailiff or some other servant, whom the vendor asked to make inquiries and by whom he was told, I am assuming falsely, that the inquiries had been made and were satisfactory. As I have said, the argument is a strong one for the view that the principal in this matter must be liable for any relevant defects in the acts of an agent in the performance of his duty.

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[7] [1906] 1 Ch. 412.

But the question here is whether this is a case in which the general principles of agency must be applied. As I have said, we are here concerned with a condition which, on the face of it and according to its language, is quite unqualified. Given the facts, then the vendor may rescind the contract; no qualification whatever is expressed in the condition, or at any rate no qualification that is relevant to this argument. But the courts having put the qualification upon the condition which I have illustrated by my reference to *In re Jackson and Haden's Contract*,[7] the true question, therefore, is: how far does that qualification go? If in truth it be established that the vendor goes to a competent solicitor, a professional man and an officer of the court, asks his advice, and, on getting the advice that he honestly and reasonably believes that all is well, has he, the vendor, sufficiently cleared his conscience, so to speak, that he can then invoke, if he wishes, his powers under this condition? That point is one which has, I confess, troubled me, but I find it unnecessary to decide it, and I shall therefore leave it to be decided when it has to be decided. For the moment, I will assume that if the vendor here did establish that he had obtained advice and the advice was such that he was reasonably entitled, without recklessness or shortcoming which could be called recklessness, to assume without more ado that his question of the title was all right, I will assume, as I say, that he is then able to invoke this power of rescission. But was he so entitled? I have come to the conclusion, on the facts, after careful consideration of them with the assistance of Mr. Vinelott and Mr. Sparrow, that this vendor, notwithstanding what passed, according to his own evidence, between himself and his solicitor cannot be acquitted of that shortcoming which can be called recklessness. I must, therefore, return to the facts.

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[7] [1906] 1 Ch. 412.

I have already said—and this is a not unimportant matter—that the vendor, at the relevant time just before this contract, had fallen seriously, or at any rate appreciably, into arrears with his instalment payments with the building society, five of these being in arrears. That was a matter to which the judge alludes at the end of the evidence, but the vendor plainly knew that he might not find the building society very amenable.

In his evidence-in-chief two questions—and they were the only two relevant questions—were put to the vendor and answered as follows: "(Q.) Did you tell them"—that is the solicitors—"that it"—that is the land—"was subject to a mortgage? "(A.) Yes, and I asked my solicitor to contact the building "society and see what they had to say about it. He said he "thought it would be all right, but he would contact them." The actual date of this conversation was very shortly before the contract was presented for signature. On August 29 the contract was presented to the vendor for signature. The name of the partner of the firm of solicitors concerned was Freeman.

The second question and answer to which I want to refer was as follows: "(Q.) Was that permission"—that is the permission of the building society—"obtained so far as you knew? (A.) As "far as I knew, no, because I was asked to sign the contract on "the 29th and Freeman was not there himself. His clerk asked "me to sign—a Mr. Scott—and before signing I said to him: "'This is all right with the building society?' He said: 'Oh, "'yes, Mr. Freeman has that in hand,' so I signed the contract." —and that is all.

I cannot refrain from saying again that no reference whatever was made to the second mortgagee, Solomon Abrahams.

On that evidence-in-chief the matter rested, so far as the vendor's case was concerned. On those answers, the vendor thought that in all the circumstances he might take the risk on what the clerk had said. But he must have been perfectly well aware that he was taking a risk and a real risk because, according to the information which Scott had given him, the solicitor had not done that which he, the vendor, had asked him to do, namely, to contact the building society. That seems to be the inevitable inference from the answer beginning "As far as I knew, no"—that is, the permission had not been obtained. But I must add another thing, namely, that if you are going to say that you asked advice and that you were acting reasonably in accepting it, I should have thought that the first thing you must show is that in asking the advice you gave your adviser all the material information. There is no suggestion in this evidence that the vendor ever told Freeman that the real trouble might turn out to be that he, the vendor, was five instalments in arrears with the building society. It may be—I know not—that there had been some passages of arms with the building society. If, in the ordinary case, you say to your solicitor: "I am selling a "bit of land which is subject, with other land, to a mortgage; "do you think the mortgagee will join?" the solicitor may reasonably say: "Oh, that will be all right." But here there was a large sum owing and the vendor was seriously in arrears, and that might very well affect the complaisance of the mortgagees. However, the matter was, not unnaturally, taken up by Mr. Vinelott in cross-examination. It is always a question for debate, being wise after the event, whether you might be well advised to let the matter stand where it is; but at any rate Mr. Vinelott did ask further questions, and it is upon one of the answers given that Mr. Sparrow has particularly relied. It will be noted that in the second answer I read, the clerk is not alleged to have said: "It is all right" or anything of that sort; what he said, when the vendor asked if it was all right with the building society, was "Oh, yes, Mr. Freeman has that in "hand." In cross-examination, Mr. Vinelott asked the vendor: "Did you ask if they had actually obtained that consent?" and the answer was: "I understood they had obtained it"—which, I observe, is inconsistent with the other answer. Then the answer in cross-examination goes on: "The clerk said Mr. Freeman "man had it in hand. He said it would be all right, and I "took that for granted."

Let me repeat that I am not suggesting for a moment that the vendor has been guilty of any lack of candour or perfect good faith. He had been in the witness-box for some time but it is to be noted that this answer is not entirely consistent with the one he had given before. Still, if the matter had rested there, Mr. Sparrow might have said: "Well, on the whole, I "had been told by the solicitor's clerk that it would be all "right"—that is, that the building society would concur.

But the cross-examination proceeded and one of the other answers of some importance which came out was in answer to the judge: "Did you ask your solicitors if they had interviewed "the building society?" Now observe the answer: "Yes, I "asked the clerk"—that is Scott—"He did not seem to know." Then he repeated: "He said Mr. Freeman had it in hand and "it was all right."

Later again, he said the same thing about Freeman having it in hand and it was at this stage, in answer to a question by the judge, that there emerged the facts about the arrears of the instalments.

Finally, I come to some questions on the next page where Mr. Vinelott took up the tale about Abrahams: it will suffice if I read one question and answer: "What did this clerk say" —that is Scott—"about the steps that Mr. Freeman had taken "to get the consent of Mr. Abrahams?" The answer was: "He "did not tell me he had taken any steps at all. He said he "had it in hand."

The impression that that evidence gives to my mind is quite plain and it is this: Scott, when he was asked on the vital day, namely, the day when the contract was signed, what the situation was about the building society, clearly did not himself know at all; he told the vendor that Freeman, the solicitor, "had the "matter in hand," obviously meaning that he was "dealing with "it" (and therefore, plainly, had not yet reached a conclusion); and the inference I draw is—and it happens to be in accordance with the facts as we know them—that Freeman had not then contacted the building society at all. For, if he had done so, he would have been bound as a competent solicitor to have told Scott that he had done so, and that the building society were unwilling to join: and to have advised a postponement of the signing of the contract. But, of course, it is said that I did not see the witnesses and it is asked whether I should draw that conclusion. I am happy to say, however, that the judge, who did see them, drew, so far as I can see, exactly the same conclusions. He said to the vendor, who was still in the witness-box: "You really had no "ground at all to suppose that the building society were going to "do exactly what you asked. It would have been very surprising "if they had, considering that your instalments were in arrear "over £100"; and I respectfully entirely endorse that expression of view by the judge, which coincides exactly with the impression I formed on the evidence. But there then followed an argument, and certainly I am not surprised that Mr. Sparrow was more persuasive than his client; and, eventually, the judge came to the conclusion that the vendor was reasonably entitled to suppose that the building society situation had been dealt with. The vital passage in the judgment is this: "It is the whole point of the "power to rescind that, if it happens before the matter is "completed, he is in some way protected"—"he" being the vendor—"from giving effect to his bargain: he does what an "honest man would have done and says, 'I am sorry, but I find "'I cannot do what I meant to do under this contract, but here "'is a provision which enables me to get out of it and to be "'relieved of my obligation under it, and I propose to do that'"; and that is what he did. "Now the defence to this case is really "simply this: 'You ought not to have believed what your solici-"'tors told you when they assured you it would be all right "'and they had the matter in hand; indeed it was unfortunate "'that you accepted what the solicitors told you.' But I "cannot imagine any man in the position of this vendor, who, "as they have said, was by profession a district meat agent "under the Ministry of Food, telling his solicitor, 'What do you "'tell me that for; is it true?'" If the solicitor had told the vendor and assured him, inter alia, that it would be all right, and that the building society would join in the conveyance, then (on the assumption I am making about the vendor not in that respect being bound by the recklessness of his agent, the solicitor) I would agree, on that assumption, with the conclusion that the judge reached in favour of the vendor.

But I regret to say that I am unable to accept the view here expressed that the solicitor did ever so advise the vendor. I have been at some pains to refer to the relevant passages in the transcript and I repeat, as the judge himself expressed it when the vendor was still in the witness-box: "You really had no ground "at all to suppose that the building society were going to do "exactly what you asked" and so on. I think it is quite clear that what Scott, the clerk, told the vendor, on the day when the contract was signed, fell very far short of any such assurance as the judge assumed in the passage I have read. I think it is plain that this vendor, who, I repeat, obviously got the impression that Scott really knew nothing about it at all, took a serious risk, and taking that risk (since, as he says, the other party must abide by the terms of the contract, including clause 10) so prima facie he must abide by his bargain in respect of the unencumbered fee simple.

I think, therefore, that this case falls within the type of case in which this apparently unqualified condition is not available to protect the vendor; and with all respect, therefore, to the view of the judge, I think that in holding that the vendor had validly rescinded, he came to an erroneous conclusion. It is a narrow point, and it has raised with it these other questions of difficulty which in the circumstances I do not find it necessary to answer.

For the reasons I have tried to state I think there was here a shortcoming which could properly be described as "recklessness" on the part of the vendor, though it was not accompanied by the smallest lack of good faith or anything in the nature of dishonesty. There was obviously no great hurry over this matter; the contract was dated August 29, 1955, and it was not until after another year that he came to rescind. I cannot think that a man can be excused because he chose to take, as I think he undoubtedly did, a considerable risk when he signed the contract at a time when Scott obviously knew nothing about it, and the inference from what he said was that Freeman had not then done as the vendor had asked him to do, namely, contact the building society, let alone Abrahams.

I would, therefore, allow the appeal and hold that there having been no valid rescission, the purchaser in this case, who does not now, and cannot, ask for specific performance, is entitled to damages on the basis of a breach of contract.

ROMER L.J. I agree. It is quite clear that a vendor is under a duty to his purchaser to satisfy himself before he signs a contract of sale that he will be in a position to convey what he is contracting to sell, and that duty was recognised by Henn Collins M.R. in *In re Jackson and Haden's Contract*,[8] to which the Master of the Rolls has referred in his judgment.

Henn Collins M.R., after referring to a decision of Knight Bruce V.-C. in the case of *Nelthorpe* v. *Holgate*[9] said[10]: "Now, what is the element that the Vice-Chancellor is seeking for "there which determines the case? It seems to me to be an "element of something on the part of the vendor less than the "law requires of him in such cases. It may stop short of fraud, "it may be consistent with honesty: but, at the same time, there "must be a falling short on his part—he must have done less "than an ordinarily prudent man, having regard to his relations "to another person, when dealing with him, is bound to do."

With the Master of the Rolls I decide this case on the narrow ground that the vendor here fell short of a proper discharge of that duty, the duty to which Henn Collins M.R. referred, both with regard to satisfying himself as to the building society concurring in the sale and releasing the property from

[8] [1906] 1 Ch. 412.

[9] (1844) 1 Coll. 203.

[10] [1906] 1 Ch. 412, 421.

their security, and similarly, with regard to Abrahams, the second mortgagee, doing the same. My Lord has already referred sufficiently to the evidence, which was called before the judge, and it seems quite clear to me that so far as the building society was concerned, the vendor was content to rely upon the somewhat shadowy assurance he received from Freeman and from Scott, the managing clerk, that the matter was "in hand," and that "everything would be all right."

Inasmuch as he was already in trouble with the building society in the matter of his instalments, I should have thought it behoved him, in discharge of his obligations to the purchaser, to make sure that the building society would not raise any trouble or difficulty about releasing this part of their security, so that it could be conveyed to the purchaser free from their mortgage.

With regard to Abrahams, the evidence would seem to show that he really gave no thought to Abrahams' mortgage at all, despite the fact that the second mortgage stood as security for a sum that was greater than the proposed purchase price of this property. It was not as though there was any real hurry about the transaction; as far as I know, the contract could have been signed the next day or the day after that without any harm or trouble coming to anybody; and I think that in discharge of his duty to the purchaser, the vendor, before signing the contract, ought to have made perfectly sure either over the telephone with Freeman, or in some other way, not only that the matter was in hand but that these mortgagees would in fact concur in the sale so that the purchaser would get what he contracted to get, namely, the unencumbered fee simple of this property.

But no, he did not. He was content to rely on those rather vague and unsubstantial assurances from Freeman and Scott, and it seems to me that in these circumstances he really brings himself within the passage from the judgment which P. O. Lawrence J. delivered in the case of *Merrett* v. *Schuster*,[11] to which the Master of the Rolls has already made reference.

There the judge said [12]: "In my judgment the cases establish "that a vendor ought not to be held disentitled to exercise a clear "and unambiguous power of rescission reserved to him in the "contract because he has made an untrue statement of fact "concerning the property agreed to be sold in a case where the "statement has been made under the bona fide belief that it is "true and there exists some substantial ground for such belief.

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[11] [1920] 2 Ch. 240.

[12] Ibid. 255.

"Such a case, in my judgment, differs materially from a case in "which the vendor either knows that the statement is untrue (as "in *Jackson and Haden's* case[13]), or has no belief in the truth "of the statement (as in *Nelthorpe* v. *Holgate*[14]), and differs "also from the case where the vendor though believing the "statement to be true has no ground, or only a fanciful and "unsubstantial ground for such a belief."

I think it is very likely that the vendor did believe that everything would be all right, and that these mortgagees would concur; but it seems to me that the evidence shows that, in the language of P. O. Lawrence J., he had "only a fanciful and "unsubstantial ground for such belief," and, accordingly, he cannot rely on the contractual right to rescind the contract conferred upon him by condition 10 of the General Conditions of Sale.

As I say, that is the ground on which I myself prefer to deal with this appeal, and, in particular, I desire to express no conclusion on what I think is the difficult question of whether, if the vendor had asked for an assurance from his own solicitors that the mortgagees would in fact concur, and the solicitor wrongly and negligently had given him that assurance, he would have been precluded from relying on this condition 10. The courts have put a gloss on conditions couched in such terms as that; and the answer to the question would depend on the extent of the restriction which the decisions have imposed upon the exercise by vendors of their legal rights in this regard. It may be that a vendor would only be affected by his own personal default or failure of duty; on the other hand, it may be that he would be equally affected by the default of his solicitors acting as his agents, though he himself was blameless. That is a point which I think does not arise for decision on this present appeal and I prefer to express no view upon it.

For the reasons the Master of the Rolls has stated, and which I have endeavoured to state, I agree that the appeal must be allowed.

PEARCE L.J. I agree with what my Lords have said. The vendor was well aware of the mortgages, although in his own words he had asked his solicitor to see what the building society had to say about it, and the solicitor "thought it would be all "right." The vendor knew that his ability to sell depended on

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[13] [1906] 1 Ch. 412.

[14] 1 Coll. 203.

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his being able to come to some arrangement both with Abrahams and with the building society with whom he was substantially in arrears, and with whom he probably expected to have some difficulty. This was not a matter of legal complexity; it was a matter of making some practical working arrangement with the mortgagees. To sign the contract without being sure that some arrangement had been made was extremely rash. Although the vendor raised the question with his solicitor's clerk before signing, he got no satisfactory answer from the clerk, who "did "not seem to know." He was not told that any steps had been taken but merely that "the matter was in hand."

A reasonably prudent man would, I think, have said: "I "cannot sign until you have found out for certain that an arrange- "ment has been made and that I can convey the property."

In my opinion there has been something of the nature of recklessness on the part of the vendor; he has certainly "done "less," to quote the words of Henn Collins M.R. to which my Lord has already referred,[15] "than an ordinarily prudent man, "having regard to his relations to another person, when dealing "with him, is bound to do."

For that reason, he is not, on the authorities, entitled to rescind under clause 10. Indeed, where the defect in title is, in view of all the circumstances, so radical and extensive, I would myself feel some doubt whether clause 10 applied at all. If the vendor is for this purpose responsible for the failure of the solicitors in respect of the matter which he entrusted to them, his failure is clear beyond argument; but I agree with my Lords that it is not necessary to decide that point now.

Whilst I appreciate the matters which weighed with the judge, I agree that the appeal must be allowed.

Appeal allowed with costs; costs on the counterclaim in the court below and costs on the claim up to date of payment in; after payment in, further costs below to await inquiry as to damages.

Solicitors: *Corbin, Greener & Cook for Dowling & Hewitt, Bishop Auckland; Butt & Bowyer for Latimer, Hinks, Marsham & Little, Darlington.*

B. A. B.

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[15] [1906] 1 Ch. 412, 421.

In re PILKINGTON'S WILL TRUSTS.
PILKINGTON AND OTHERS *v.* PILKINGTON AND ANOTHER.

1959
May 14.

Danckwerts J.

[1959 P. No. 987.]

Trust and Trustee—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement—Avoidance of death duties—Whether advancement for benefit of object of power—Whether rule against perpetuities infringed—Whether valid exercise of power of advancement—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Distinction—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold his residuary estate upon trust in equal shares for all his nephews and nieces living at his death who should attain 21 years or being female marry under that age, the trustees to apply the income of the shares for the maintenance, education, support or benefit of the beneficiaries and to accumulate the balance until they attained 25 years, or being female married under that age; subject thereto the income was to be held upon protective trusts for the benefit of the beneficiaries with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after their deaths on trust as to capital and future income for such of their children as they should appoint. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925.[1] The testator died on February 8, 1935. One of his nephews, who had attained 25 years of age, was married and had three infant children. His second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share

[Reported by MARGARET THOMAS, Barrister-at-Law.]

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[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advancement or benefit, in such manner as "they may, in their absolute discretion, think fit, of any person "entitled to the capital of the trust "property . . . Provided that—(*a*) "the money so paid or applied for the "advancement or benefit of any "person shall not exceed altogether "in amount one-half of the presumptive or vested share or interest "of that person in the trust "property . . ."

in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:—

Held, (1) that a power of advancement might legitimately be exercised if it was in the form of providing benefits for the objects of the power coupled with a settlement of money advanced in such a way that the wife, children or remoter issue of the objects would become beneficiaries under the settlement, and that the saving of death duties was a benefit to the objects of the power.

In re Ropner's Settlement Trusts [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n. applied.

(2) That since the exercise of a power of advancement, unlike the exercise of a limited power of appointment, took the property concerned out of the original settlement, and the proposed exercise of the power would, in effect, result in a resettlement on new trusts, the relevant period for the application of the rule against perpetuities was to be determined by reference to the proposed settlement; accordingly, the trustees might properly exercise the power in the manner proposed.

Dictum of Upjohn J. in *In re Wills' Will Trusts*, ante, 1, 12; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472 considered.

ADJOURNED SUMMONS.

By his will dated December 14, 1934, a testator, William Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington by their named wives, living at his death who should attain the age of 21 years or being female marry under that age; there was a provision substituting for a beneficiary dying in the lifetime of the testator his or her children. The share of each beneficiary was, so far as is here material, settled in the following manner: until the beneficiary attained the age of 25 years or being female married under that age, the trustees were to apply the income of the share for the maintenance, education, support or benefit of the beneficiary and to accumulate the balance; subject to this the trustees were to hold the income of the share upon express protective trusts for the benefit of the beneficiary during his or her life with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. The trustees were empowered during the period of 21 years from the testator's death to withhold any part of the income from the beneficiaries and to accumulate it. After their death the capital and future income of the share of each beneficiary was to be held in trust for such of their children or remoter issue as they should appoint with a trust in default of appointment. If the trusts of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

The first defendant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, had attained 25 years and was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second defendant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund with power to apply all or part of the accumulations as if they were income of the current year; if she should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was made applicable.

By this summons the trustees of the will sought a declaration whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital in the interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

B. L. Bathurst Q.C. and *James Cunliffe* for the trustees. In *In re Baron Vestey's Settlement* [2] the Court of Appeal held that an allocation making trust money the absolute property of an infant was permissible, such application being for the benefit of the infant; and in *In re Ropner's Settlement Trusts* [3] it was conceded that settlements in exercise of the power of advancement which were for the benefit of the objects might properly be made. However, the proposed settlement is invalid; if it is read back into the will of William Norman Pilkington it infringes the rule against perpetuities as it purports to confer benefits upon Penelope's children who are unborn persons. Further, the proposed settlement contains provisions amounting to a prohibited delegation of the power of advancement: see *In re May's Settlement*,[4] *In re Mewburn's Settlement*[5] and *In re Wills' Will Trusts*,[6] where Upjohn J. in his remarks on delegation indicated the limits to a power of advancement. A conditional advance, such as that in *Roper-Curzon* v. *Roper-Curzon*,[7] is a different matter from an advance to an infant. None of the authorities, with the possible exception of *In re Ropner's Settlement Trusts*,[8] where there was no argument as to the power of trustees to apply funds by making a settlement, touches the present case. [Reference was also made to *In re Meux, decd.*[9]]

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[2] [1951] Ch. 209; [1950] 2 All E.R. 891.

[3] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n.

John Pennycuick Q.C. and *Eric Griffith* for the defendants. This transaction, if allowed, will be for the benefit of Penelope. A power of advancement is fundamentally different from a power of appointment; in the latter case the appointed trusts are read into the original instrument and become part of it, while in the former case the property becomes no longer subject to the original instrument: see the remarks of Romilly M.R. in *In re Gosset's Settlement*[10] and of Byrne J. in *In re Fox*.[11] In *In re Wills' Will Trusts*[12] it had been argued that no advance was made where new trusts were declared concerning certain scheduled investments, but this argument was rejected by Upjohn J. The plaintiffs' arguments are irreconcilable with, and an artificial restriction on, the general statement of Upjohn J. that trustees exercising a power of advancement may make a settlement upon an object of a power if it is for his benefit.[13]

The trustees, in making a new settlement on behalf of an infant, are making a new disposition, and if they have power to do this, there is no ground in principle for looking back to the original instrument for the purpose of the perpetuity rule. In *Roper-Curzon* v. *Roper-Curzon*[14] the advance authorised was in no sense paid to the objects, but it was paid directly to trustees of the new settlement on new trusts which could not be read into the original settlement.

The only power created in favour of the trustees by the proposed new settlement is the statutory power of advancement, and therefore no question of delegation arises.

Trustees must act bona fide in the interests of the beneficiary.

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[4] [1926] Ch. 136.

[5] [1934] Ch. 112.

[6] Ante, 1, 12; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472.

[7] (1871) L.R. 11 Eq. 452.

[8] [1956] 1 W.L.R. 902.

[9] [1958] Ch. 154; [1957] 3 W.L.R. 377; [1957] 2 All E.R. 630.

[10] (1854) 19 Beav. 529.

[11] [1904] 1 Ch. 480.

[12] [1959] Ch. 1, 6, 10.

[13] Ibid. 12.

[14] L.R. 11 Eq. 452.

In the present case the beneficiary is a young child; the transaction is valid and it is for her benefit; a different question might arise if the beneficiary were 20 years old and absolutely entitled. Where a power of advancement is exercised in the present manner it is common form for the settlement to include trusts in favour also of the wife and issue of the beneficiary, persons whom he would have to maintain.

Bathurst Q.C. in reply. The defendants cannot succeed unless the statement as to delegation in *In re Wills' Will Trusts*[15] is held to be wrong. In *Roper-Curzon* v. *Roper-Curzon*[16] the advanced trust property was settled by the son as an adult. The question is whether it is competent for trustees to make a settlement by way of advancement in favour of an infant where trusts are declared for non-objects of the power and the trusts are void for perpetuity; this can only be done if it is a new settlement, which is not the present case.

DANCKWERTS J. stated the facts and continued: It is suggested that the trustees in execution of the power of advancement should raise a sum of £7,590 and pay that over to the trustees of the proposed settlement to be held upon trust. That is much less than the total share of Richard Godfrey Pilkington and his issue as appointed under the testator's will: but the question has been raised whether that would be a legitimate exercise of the power of advancement: in particular, whether it would infringe the rule against perpetuities, or whether it would amount, by reason of the power of advancement contained in the proposed settlement and various other things, to a delegation which is prohibited. If the provisions of the proposed settlement are to be read into the testator's will, they might offend against the rule against perpetuities, which applies to a person who is not a life in being at the date of the testator's will. The point about delegation seems to me one which is slightly different, but depends possibly on the same principles.

It has been submitted at the last moment in the course of the argument that a proposed settlement of this kind would amount to an application of the sum advanced for non-objects of the power of advancement, that is to say, Penelope's children. There is a certain amount of authority in regard to that to which I have been referred. I do not propose to go through the cases in detail, but they do establish quite plainly that it is a proper exercise of a power of advancement for the benefit of a named person if the advancement is made upon terms which are for the benefit of that person, or for the purposes of a settlement by that person, or in the form of a settlement for that person's benefit. In the present case there are benefits to be found because of the question of the payment of death duties in certain events, and that is the kind of reasoning which was accepted as perfectly legitimate in *In re Ropner's Settlement Trusts.*[1]

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[15] Ante, 1, 12.

[16] L.R. 11 Eq. 452.

The latest case on the subject is *In re Wills' Will Trusts,*[2] in which Upjohn J. made certain observations which have given me some difficulty. The point which has really troubled me in this case is whether there is anything in the decision in *In re Wills' Will Trusts* [3] which requires me to come to the conclusion that it is not proper to do what it is proposed should be done in the present case. I think it is a correct argument that the power of advancement is not the same as the power of appointment. It is plain on principle that, when a power of advancement is exercised, the fund is taken right out of the trust estate and devoted to the benefit of some person who holds it clear of the limiting trusts of the settlement under which the power of advancement is exercised. It is different in this respect from a limited power of appointment, which is merely a power to mark out the trusts of the settlement or will and, therefore, operates when the power of appointment is exercised so that a trust which is appointed by somebody else is read into the settlement or will. In such a case, far from the property being taken out of the settlement or will, the trusts in question are incorporated in the settlement or will. Therefore, in the case of the exercise of a power of appointment which is not a general but a limited power, the rule against perpetuities cannot be applied in relation to the date of the proposed exercise of the power of appointment, whether it is made by settlement or will.

That seems to me the whole point in the present case. I should have thought that, quite plainly, the exercise of the power of advancement was something which took the money so advanced out of the settlement and either resulted in the money being handed over to the object of the power of advancement, or, as the cases show, in it being resettled on new trusts, which necessarily have nothing to do with the trusts of the original settlement at all but are created as a result of the exercise of the power of advancement and nothing else.

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[1] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n.

[2] [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472.

[3] [1959] Ch. 1.

As regards the suggestion that the power of advancement cannot incorporate provisions in favour of persons who are not actually one of the objects of the original settlement, it seems to me, as Mr. Pennycuick said, to be common form that, when a settlement is made of a fund which is advanced to the beneficiary under such powers, the settlement may include trusts in favour, not only of the beneficiary himself, but his wife, or, it may be, his widow, and issue, and, consequently, I do not think in the present case, if I am right on my general point, that the trust in favour of Penelope is bad. That seems to me, on principle, the correct answer to be given to the point which is raised. If I am right in the view which I have taken that a power of advancement is essentially different from a power of appointment, that also seems to me to dispose of the point about delegation.

In the course of his judgment in *In re Wills' Will Trusts*[4] Upjohn J., after saying that in several other cases the court had not had the benefit of certain arguments which had been put before him, continued[5]: "Nevertheless, so far as this court is "concerned, these authorities do establish the proposition that "trustees exercising a power of advancement may make settle-"ments upon objects of the power if the particular circumstances "of the case warrant that course as being for the benefit of the "object of the power." Those remarks about the object of the power were relied upon by Mr. Bathurst in the course of his argument that the present proposed settlement was inadmissible because Penelope's children were unborn, but I do not think that the mind of Upjohn J. was directed to that point, but that he was referring generally to the question that there can be a settlement in the course of the exercise of the power of advancement. Upjohn J. continued[6]: "What the authorities typified by *In re* "*May*[7] and *In re Mewburn*[8] establish to my mind is that any "settlement made by way of advancement upon an object of "the power by trustees must not conflict with the principle "delegatus non potest delegare. Thus, unless upon its proper "construction the power of advancement permits delegation of "powers and discretions, a settlement created in exercise of the "power of advancement cannot in general delegate any powers

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[4] Ante, 1.

[5] Ibid. 12.

[6] Ibid.

[7] [1926] Ch. 136.

[8] [1934] Ch. 112.

"or discretions, at any rate in relation to beneficial interests, to "any trustees or other persons, and in so far as the settlement "purports to do so it is pro tanto invalid. I say that without "prejudice to the propriety of including an ordinary power of "advancement in such a settlement: see *In re Morris*.[9]"

In *In re Morris*[9] it was held by the Court of Appeal that the inclusion of a general simple power of advancement in what is called the standard form was not objectionable, and in the present case, so far as the power of advancement which is proposed is concerned, it merely refers to a statutory power. That is by the way.

What puzzles me about this passage in the judgment of Upjohn J. is his reference to *In re May's Settlement*[10] and *In re Mewburn's Settlement*[11] as authorities for the proposition which he put forward; it is quite plain that they are both cases on the exercise of powers of appointment which, as I have already indicated, are different from the exercise of powers of advancement, and, therefore, it seems to me that the cases to which he refers were not, strictly speaking, relevant to the remarks which he subsequently made. I am not quite sure what he had in his mind, and I feel that in the somewhat different circumstances of the present case I should not adopt that passage in his judgment. I think it may be that the distinction between powers of advancement and powers of appointment was not really in his mind at that time, and, consequently, I do not feel bound to regard what he said as ruling out a conclusion in the present case in favour of the other proposition which is being put forward. Consequently, I have come to the conclusion, on principle, that the exercise of the power of advancement is not objectionable if it is in the form of providing benefits for the objects of the power which are coupled with a settlement of the moneys so raised and allocated in such a way that the children or remoter issue of the objects would become beneficiaries under the settlement. Again, it seems to me that it is not objectionable to reach the conclusion that such a settlement with discretionary powers, particularly if they are of a reasonable kind, is quite proper.

A further conclusion is this: that in effect it is a resettlement of the money which is taken right out of the original settlement in the will. For the purposes of the rule against perpetuities, the relevant period and the relevant purposes for the application

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[9] [1951] W.N. 412; [1951] 2 All E.R. 528.

[10] [1926] Ch. 136.

[11] [1934] Ch. 112.

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PILKINGTON'S WILL TRUSTS, *In re.*

of the rule are those contained in the proposed settlement. It is not so tied up with the original will that the proposed provision is obnoxious to the rule against perpetuities. I will declare that the trustees have a right to exercise the power of advancement in the manner proposed.

Declaration accordingly.

Solicitors: *Alsop, Stevens & Co., Liverpool.*

1958
Dec. 1, 2, 3, 4, 5, 16.

Harman J.

In re EICHHOLZ, DECD.
EICHHOLZ'S TRUSTEE *v.* EICHHOLZ.

Gift—Intent to defraud creditors—Proof—Gift by insolvent donor—No proof of fraudulent intent—Whether voidable—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 172.

Bankruptcy—Executor—Insolvent estate—Administration in bankruptcy—Gifts made by deceased prior to death—Effect of Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *on Law of Property Act*, 1925, *s.* 172.

The deceased married the defendant, his second wife, on January 18, 1955. By a contract dated February 14, 1955, he agreed to buy a freehold dwelling-house for £15,500, and paid a deposit of £1,550. By letter dated February 14, 1955, the deceased wrote to his bank " Under a contract of marriage . . . I am pro-" viding a house for her [the defendant] . . . " and having named the house and the vendor, requested the bank to lend him part of the purchase-money, and made suggestions for the repayment of the loan. Completion took place on March 15, 1955, by a conveyance by which, after reciting, wrongly, that there had been an agreement with the defendant for the purchase, the property was conveyed to her in fee simple. The deceased was not a party to the conveyance.

The deceased died on November 17, 1957. His estate was hopelessly insolvent and it was discovered that he had been insolvent at the date of the purchase of the house. By his will he appointed the defendant and his brother executors, and they swore an Inland Revenue affidavit in January, 1958, in which the defendant claimed the dwelling-house as her property.

As a result of many further claims made by creditors against the estate, the executors applied in April, 1958, to have the estate administered in bankruptcy.

The trustee, whose claim for the return of the property was refused by the defendant, issued a writ claiming a declaration that there had been no gift of the property to the defendant which, therefore, she held as trustee and not beneficially; alternatively, that under section 172 of the Law of Property Act, 1925, the conveyance was voidable:—

Held, (1) that there was a gift of the house by the deceased to the defendant, but that the gift was not made for good consideration, the letter of February 14, 1955, being too ambiguous to support a contract made in consideration of marriage.

(2) That the administration of a deceased's property by the Court of Bankruptcy under section 130 of the Bankrutcy Act, 1914, did not exclude the operation of section 172 of the Law of Property Act, 1925.

In re Gould (1887) 19 Q.B.D. 92 distinguished.

(3) That the trustee could set aside the gift of the house to the defendant under section 172 of the Law of Property Act, 1925, it being unnecessary to prove a fraudulent intent and sufficient merely to show that the circumstances were such that the gift would have the effect of defeating creditors.

Dictum of Lord Hatherley L.C. in *Freeman* v. *Pope* (1870) 5 Ch.App. 538, 540 applied.

ACTION.

The trustee of the property of Robert Nathaniel Eichholz, deceased, whose assets were being administered in bankruptcy, claimed a declaration as against the defendant, the widow of the deceased, that the freehold property known as " Peppermills " was held by her as trustee for the estate of her deceased husband and not beneficially.

MOTION.

The trustee in bankruptcy of Robert Nathaniel Eichholz, deceased, by a motion in bankruptcy, claimed a declaration as against the respondent, the widow of the deceased, that certain chattels were held by her as trustee for the estate of her deceased husband and not beneficially.

The following statement of facts, relevant to both action and motion, is taken from the judgment of Harman J.: The defendant in the action and the respondent to the motion was the widow of Robert Nathaniel Eichholz, he having married her on January 18, 1955. She was his second wife. When he died on November 17, 1957, the deceased was to all appearances a substantial man. He was a partner in an old-established firm of solicitors. He left a will under which his widow and his brother were appointed executors and they proved it on April 28, 1958. It was, however, by that time apparent that he was hopelessly insolvent. When the executors swore the Inland Revenue affidavit in January, 1958, this was already well known to them, for they swore his assets at some £45,000 and his estimated liabilities at £74,500. The affidavit showed that the deceased had a lease of a flat, 47, Lowndes Square, London, and owned its contents, valued by the executors at £2,000. It also showed that since his marriage to his widow the deceased had made gifts to her valued at £44,000, and stated as follows: "On March 15, 1955, the deceased "provided the purchase money for the property known as "Peppermills, Lamberhurst, Kent, which was conveyed to his "wife. Price—£15,000. During the period March 15, 1955, "to the date of death the deceased purchased for his wife various "fixtures, fittings, furnishings and pictures for use in the above "property. Value estimated at £24,000. Since January, 1955, "the date of the deceased's second marriage, he purchased various "personal chattels for his wife as presents. Value estimated at "£5,000." It was said that the last item represented furs and jewellery valued at a much higher figure. The affidavit continued: "Total estimated value of gifts inter vivos £44,000."

The affidavit also showed that the deceased took out policies on his life in favour of the widow under the Married Women's Property Act worth some £20,000. It appeared soon after his death that the extent of the claims likely to be made against the estate far exceeded those mentioned in the Inland Revenue affidavit. Numerous clients of the deceased entered claims against the Law Society to be indemnified against misappropriations by him of moneys entrusted to him as a solicitor, and the Law Society employed a chartered accountant, one Ridsdale, to investigate these. He gave evidence and swore that, though the investigations were by no means complete, the misappropriations amounted to something like half a million pounds. He stated that at the end of 1954, before the second marriage, the minimum of the claims was £171,000, and that the assets were then about £21,000, and that misappropriations had since proceeded on an ever-increasing scale. He said, further, that there was no chance of solvency, however much might be recovered in the present proceedings, and any other claims that there might be to recover moneys in the hands of third parties.

On April 23, 1958, the executors applied ex parte to have the assets administered in bankruptcy. That application was acceded to on the same day. On June 26, one Wilson, the partner of Ridsdale, was appointed trustee. The trustee claimed the return by the widow of the property Peppermills and all its contents sworn by the Inland Revenue affidavit to have been given to her. Both these requests were refused. The widow then enlarged her claims by laying claim to the contents of the flat, which she had sworn to belong to the estate. These contents she had removed to Peppermills, where they were at the date of the proceedings. The action against her in the Chancery Division was begun by writ dated July 25, 1958, and the notice of motion in bankruptcy by the trustee was dated August 15. The action concerned Peppermills and the motion the chattels. The trustee's first contention in both cases was that there were no valid gifts by the deceased, and that the widow held both house and chattels as trustee and not beneficially. By way of alternative, the trustee claimed first to recover both land and furniture under section 172 of the Law of Property Act, 1925, and by way of further alternative, to recover the property under section 42 of the Bankruptcy Act, 1914. The last claim was not pursued.

The facts as found by the court, leading up to the purchase of the house were as follows: The widow, a young woman of Italian nationality, then known as Cesira Buran, came to this country from her native Udine in 1952 to act as cook in a house in Flood Street, Chelsea, then the property of a Mrs. Murray and the place where the deceased was then living. The widow, in evidence, said that she first got to know her husband in the middle of 1953, and that he first spoke to her of marriage towards the end of 1954 when he proposed to her and she accepted him. They then removed from Flood Street and went to live in a flat at Park West and two or three weeks later were married. She said that before this, but after she had become engaged to him, the husband spoke of a house, saying that he would like to buy a house for her, but that the only thing settled was that it should be a country house. He apparently took her about looking at houses and in December, 1954, first saw a house in Kent, then known as Lamberhurst Manor. After the marriage they decided to buy it and she knew no more about it until the purchase was an accomplished fact, when he said: "This is a house for you." As to money, she was a young woman without means, and was first drawn into his financial orbit when he authorized her in October, 1954, to sign cheques on what he called a household account with Barclays Bank, Sevenoaks. In instructing the bank he described her as his housekeeper. She drew a number of small cheques on this account during October and November, 1954. Immediately before the marriage the deceased opened two accounts in the joint names of himself and the widow, on which either could draw. One was styled the household account and on this she drew cheques occasionally. On the other she only drew one cheque for £200 for the purchase of some shares. This was made out for her by the deceased and signed at his request. He made her no allowance but supplied her with cash when she wanted it, and gave her lavish presents of furs and jewellery from time to time. She said that she was free to draw on both accounts at her wish. Soon after the marriage the purchase of Lamberhurst Manor was decided upon and the contract was signed on February 14, 1955. This was a contract between the vendor and the deceased, who agreed to buy the property for £15,500 and in addition certain fitted carpets and so forth at a valuation. The deposit of £1,550 was drawn by the deceased from his account with his firm. On the same day he wrote to the bank in these terms: "Under a contract of marriage with "Mrs. Eichholz I am providing a house for her and am buying "Lamberhurst Manor from Sir Thomas Overy. The cost is "£15,500. I should like to borrow £7,500 from Barclays repay- "able at call, but on the understanding that in ordinary "circumstances I pay it off at the rate of £1,500 per annum. At "the same time it is relevant to say that as a result of a "redistribution of certain interests I should be able within two "months to add to the securities normally lying with you "additional ones to a total of some £9–£12 thousand. I expect "to arrange for the completion of the house purchase about "March 31. I should be glad to hear that my proposal for a "loan on the security of the house without any specific additional "collateral is acceptable."

He did not complete the transaction as there proposed, but instructed the bank to sell certain bearer securities, which were later discovered to be the property of his clients, and to credit the joint account with the proceeds. The transaction was completed on March 15, 1955, by a conveyance by which, after reciting, contrary to the fact, that there had been an agreement with the widow for the purchase, the property was conveyed to her in fee simple. As appeared from this document, the deceased had by this time decided to call the house Peppermills, that being, according to the widow, its old name which he said he preferred. He did not ask her opinion about it. There was no documentary evidence to indicate why the conveyance was made in that way. The deceased was no party to it, nor was there any recital that it was made by his direction. His Lordship inferred that the deceased orally instructed his partner, who had acted for him, to draw the conveyance in that way, and that the vendor had raised no objection. The balance of the purchase-money, which amounted to some £15,000, was provided by a banker's draft debited to the joint account. The bearer securities had already been sold, but owing to settling dates on the Stock Exchange the proceeds, amounting to some £18,000, were not credited to the joint account until March 23. At the date of the conveyance the joint account was already some £3,000 overdrawn. The overdraft was reduced to some £500 on March 23, and thereafter till the death of the deceased was sometimes in credit and sometimes overdrawn. At his death it was in credit and afterwards was drawn on by the widow for her own purposes until March 25, 1958, when she reimbursed her drawings since her husband's death and the balance passed to the trustee. This, his Lordship found, to be an acknowledgment by her that she had no beneficial interest in the moneys in that account.

From the time of the marriage onwards the deceased and the widow from time to time purchased furniture and so forth for the house, and they went into occupation in June, 1956, and so remained until his death. The widow was the rated occupier and the bills for services were addressed to her, but she said in evidence that she had nothing to do with that side of the business, and that her husband attended to all such matters and paid the servants and the household bills himself, sometimes out of the joint account. The property was insured in her name, but he paid the premiums. At the date of the present proceedings the house had been sold under an arrangement between the parties, and some few of the chattels had been sold by or were in the possession of Messrs. Christie, Manson & Woods, while the rest were to be sold by auction on the premises shortly before completion and the proceeds paid into a joint account to await the result of the proceedings.

Charles Russell Q.C. and *Muir Hunter* for the trustee in bankruptcy. There are three questions, namely, did the deceased intend to make a gift of the house to his wife? Was the gift made with an intention to defraud his creditors? If there was a gift, is it voidable under section 42 of the Bankruptcy Act as a voluntary settlement? This last question cannot be pursued in this court in view of the decision of the Court of Appeal in *In re Gould.*[1]

The question is whether, on the evidence, the true conclusion is that the deceased intended the whole beneficial interest in the property to go to his wife. The ordinary presumption, when A provides money and property is bought in B's name, is that there is a resulting trust for A. That is the situation here as borne out by the evidence. The deceased paid all rates, insurances and other outgoings on the property, and there is no doubt that if the house had been sold, he would have kept the purchase-money himself because he regarded it as *his* property. He never intended the whole beneficial interest to pass to the defendant.

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[1] (1887) 19 Q.B.D. 92.

Any presumption of advancement raised by the fact of the conveyance of the property in the defendant's name, the purchase money being provided by the deceased, is easily rebuttable. Parker L.J., in *Silver* v. *Silver*,[2] said that such a presumption in the case of a family asset such as a house is nowadays a very weak one, and here, moreover, there is ample evidence to rebut it. Further, equity will surely not make such a presumption of advancement where the person providing the money for the purchase is a fraud and a cheat. The presumption must be related to the mind of the donor. It is submitted, therefore, that there was no gift of the house to the defendant, and that she holds it as trustee and not beneficially.

If, as the defendant contends, there was a gift of the property to her by the deceased, then that gift was made with an intention on the part of the deceased to defraud his creditors and can be set aside under section 172 of the Law of Property Act, 1925. An intention to defraud must be the true inference if only because of the subsequent insolvency of the deceased.

The defendant will contend that the relevant law has been altered by the repeal of the Statute 13 Eliz. 1, c. 5, by section 172 of the Law of Property Act. If section 172 does not extend to the method of defrauding creditors adopted by the deceased in this case, then section 172 becomes a cheat's charter.

By 13 Eliz. 1, c. 5, a bona fide purchaser without notice is protected and the statute sets out in what circumstances the courts will infer an intention to defraud creditors. In the case of a disposition by a man who is deeply insolvent, the courts will draw the inference that the act was intentional. In this case, therefore, the court should infer an intention to defraud. [Reference was made to the provisions of the Statute of Elizabeth, especially the long title; May on Fraudulent Conveyances, 3rd ed., pp. 26–29, and Kerr on Fraud and Mistake, 7th ed., p. 308.]

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[2] [1958] 1 W.L.R. 259, 265; [1958] 1 All E.R. 523.

May sets out the cases in which a voluntary conveyance is voidable, and section 172 of the Law of Property Act is adopted almost word for word from May. It is submitted that the transaction regarding Peppermills, whereby the beneficial interest was conveyed to the defendant at the expense of the deceased, is void under both the Statute of Elizabeth and section 172 of the Law of Property Act if there was an intention to defraud.

A post-nuptial settlement must show a binding antenuptial bargain: Halsbury's Laws of England, 2nd ed., vol. 29, p. 555. Here, the defendant, in order to succeed in her plea that the house was conveyed for good consideration, must set up and prove that there was such a bargain which was both binding and specifically enforceable: *In re Fickus*[3]; *In re Holland.*[4] In the circumstances, however, considering that the deceased provided the purchase money and had the conveyance made in his wife's name, one must assume that he intended it as a gift. Under the old law that would have been set aside. There was no settlement in any ordinary sense here; there was nothing but an absolute gift to her, which is voidable. If a conveyance was itself set aside under the old law the vendor was in the position of a bare trustee for the person who had provided the purchase money: May, p. 17. In this case, therefore, the deceased, as provider of the purchase money, was, in equity, the owner of the property. [Reference was made to *Barrack* v. *M'Culloch.*[5]]

If the trustee here can prove an intention to defraud, then all the transactions come within the old law as set out in the Statute of Elizabeth. The only question before 1926 was, was it a kind of property which could be taken in execution? Even if it could not be so taken during the life of the donor, could the gift be set aside after his death? Once there is a transaction of any kind, the same limitations of the old law to avoidance during life apply, but not after the donor is dead.

It is not right to say that section 172 of the Law of Property Act has radically changed the law where there is a fraud on creditors. No textbook writer since 1925, in dealing with fraudulent conveyances, has suggested such a thing: Wolstenholme and Cherry say that the Act *replaces* the Statute of Elizabeth.

[HARMAN J. How is the present transaction a fraudulent conveyance?]

The entire equitable interest remained in the deceased subject to a vendor's lien for the unpaid purchase money. At the moment when he paid the purchase money he was divested of the whole beneficial interest, which then vested in the defendant, the conveyance being made in her name. The fraud consists in his having the conveyance made in her name. If he had been honest with his creditors, he would have had the conveyance made in his own name or conveyed to her with an express declaration of trust for himself. The fraud lies in putting it out of his power to recall the property or undo the transaction.

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[3] [1900] 1 Ch. 331.

[4] [1902] 2 Ch. 360.

[5] (1856) 3 K. & J. 110.

The defendant contends that in the absence of any written document there is no conveyance which can be set aside; but the trustee says that the lack of writing is no obstacle. For centuries a conveyance in fraud of creditors has meant any and every kind of dealing with property; a written instrument is not essential. The very widest possible interpretation should be given to the statute.

Harold Christie Q.C., *Andrew Martin* and *E. W. H. Christie* for the defendant. In this case there was obviously a gift of the house and the chattels from the deceased to the defendant, who now holds them beneficially. There is, moreover, clear evidence of an intention on the part of the deceased to make a gift from the fact that he had the house conveyed in her name. The presumption that he intended the house to be hers is almost irrebuttable; there is no evidence to the contrary, which is always necessary to rebut such a presumption. If there was an intention on the part of the deceased to defraud his creditors, the presumption is strengthened.

The gift to the defendant of the house was not voluntary but was made in consideration of marriage. This is borne out by the letter of February 14, 1955, written by the deceased to his bank. Moreover, the defendant gave valuable consideration in that the purchase money was raised on a joint account for which she was liable.

So far as the trustee's application to set aside the alleged gifts is concerned, in the case of an administration by the court, neither section 42 of the Bankruptcy Act, 1914, nor section 172 of the Law of Property Act, 1925, can apply, the position being that when an order is made for the administration of an estate, it is the debtor's *own* property that is to be administered and not that of third parties. This proposition depends on the judgment of Cave J. in *In re Gould*,[6] which was upheld by the Court of Appeal. The judgment of Cave J. is dealing specifically with section 42 of the Bankruptcy Act, but it is equally applicable to section 172 of the Law of Property Act.

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[6] 19 Q.B.D. 92.

[HARMAN J. Do you mean that no fraudulent conveyance made in a debtor's lifetime can be upset once the debtor is dead?]

Yes. That is borne out by authority. If section 42 applied, the court would find itself administering property that the debtor had given away.

[HARMAN J. If there were a creditor's administration in Chancery, why would the creditors not be authorised to set aside a settlement as void under section 172 of the Law of Property Act? That would be outside the rules of bankruptcy.]

Because the court is not entitled to administer the property of a person other than the debtor.

[HARMAN J. If a man has been defrauding his creditors, why should they not get their property back again under section 172 whether the man be dead or alive?]

By the decision in *In re Gould* [6] the trustee can take proceedings under section 42 when the debtor is alive but not after he is dead. In that case the Court of Appeal did not regard the subject-matter of a settlement made by a debtor as being his property; he had conveyed it away by an instrument that was good inter partes. When administering an estate the court will not set aside such an instrument. *In re Gould* [6] is confirmed by *In re Withernsea Brickworks*,[7] which leads inevitably to the conclusion that Cave J. and the Court of Appeal reached in *In re Gould*,[8] namely, that the assets to be administered were those of the bankrupt and no one else. [Reference was made to *Gascoigne* v. *Gascoigne*,[9] *In re D'Epineuil* [10] and *Hasluck* v. *Clark*.[11]]

The trustee is seeking to set aside a conveyance under section 172 of the Law of Property Act, 1925. But the question then arises, *what* conveyance is he seeking to set aside? In the absence of any available written document there is no conveyance by the deceased (within the meaning of section 172) capable of being set aside. The only conveyance was made by Sir T. Overy, for value and in good faith, and that cannot be set aside. The word "conveyance" of necessity implies writing (section 205 (1) (ii) of the Law of Property Act, 1925). The Oxford English Dictionary says that a "conveyance" in modern usage must be made by a deed or in writing. In this case, all there is is a sort of arrangement whereby the deceased procured the property to be conveyed to his wife.

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[6] 19 Q.B.D. 92.

[7] (1880) 16 Ch.D. 337.

[8] 19 Q.B.D. 92.

[9] [1918] 1 K.B. 223; 34 T.L.R. 168.

[10] (1882) 20 Ch.D. 217, 218.

[11] [1899] 1 Q.B. 699; 15 T.L.R. 277.

The decisions made under the old Statute of Elizabeth are not applicable here because that statute was repealed by section 172 of the Law of Property Act, and not re-enacted. The very different language used in the modern Act is most significant. Indeed, where a statute has been replaced by an enactment in such different terms, it is a salutary rule that the case law should be regarded as having expired with it: see *Riches* v. *Westminster Bank*,[12] *per* du Parcq L.J. The Statute of Elizabeth did not require that the fraudulent conveyance should of necessity be in writing; it is only necessary to read the terms of section 172 to see that the Law of Property Act does require writing. Indeed, the whole tenor of the Law of Property Act is to replace methods of assigning by feoffment, etc., by the use of a deed. [Reference was made to sections 50 and 51.] In this case, then, the common law no longer applies; it was agreed by Mr. Russell that when a statute is dealing with specific matters, the common law is no longer applicable.

The trustee in bankruptcy is in no better position than the bankrupt himself would have been, unless there is something in the Bankruptcy Act to make him so.

Russell Q.C. in reply. The true conclusion is that the defendant was and is a trustee of the property for the deceased. If that be right, there is no need to consider the *In re Gould* [13] line of cases. If that be wrong, and the deceased procured the equitable as well as the legal estate to pass to the defendant, then, if it is accepted that he did so with an intention to defraud his creditors, the transaction is voidable under section 172 of the Law of Property Act. As to Mr. Christie's submission that the conveyance cannot be avoided after the debtor's death, it has been the regular practice of the courts, in administering estates, to set aside transactions made in fraud of creditors: *Freeman* v. *Pope* [14]; *Taylor* v. *Coenen* [15]; Kerr on Fraud and Mistake, 7th ed., p. 304, and May on Fraudulent Conveyances, 3rd ed., pp. 18–19. A transaction which could not be set aside in the debtor's lifetime could be impeached after his death. [Reference was made to *In re Mouat.*[16]]

Cur. adv. vult.

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[12] [1945] Ch. 381; [1945] 1 All E.R. 466.

[13] 19 Q.B.D. 92.

[14] (1870) L.R. 5 Ch. 538.

[15] (1876) 1 Ch.D. 636.

[16] [1899] 1 Ch. 831.

December 16. HARMAN J. read the following judgment. Having stated the facts, his Lordship continued: The first question to be considered in the circumstances I have related is whether in connection with the house there was a gift by the deceased to the widow. This was argued upon the footing that the house was conveyed by the vendor to her upon an orally given direction by her husband. An alternative possibility is that the recital in the conveyance is correct, that he entered into the contract as her agent, and provided her with both the deposit and the balance of the purchase price. I propose to consider the first alternative. Here the parties being husband and wife and the conveyance being in her favour there is a presumption, in the absence of evidence to the contrary, that this was an advancement by him to her, rebutting the ordinary presumption of a resulting trust which arises when property is bought in the name of B and the purchase-money provided by A. It is true that this presumption of advancement in the case of a family asset, like a house, is nowadays not considered a very strong one and may be easily rebutted: see the judgment of Parker L.J. in *Silver* v. *Silver*.[1] There must, nevertheless, be some evidence to contradict it. Here there is considerable evidence of an intention to make a gift. First, that of the widow herself, which no doubt must be jealously scrutinized, but is not inadmissible. Next there is the deceased's letter of February 14, 1955, which I have already read, and which states explicitly that he is providing her with a house. Thirdly, the purchase-money was paid out of the joint account in which she had, on the face of it, a joint interest. Nor must it be forgotten that he must have been well aware at the time that he was hopelessly insolvent; which makes it the more likely that he should wish to put the joint home beyond his creditors' reach. On the other side there is no direct evidence beyond the fact that he treated the house as his and paid all the rates, taxes, and expenses such as electricity and the gardeners and servants. This seems to me quite consistent with a gift. There was also a cottage bought in the widow's name after the marriage, which the deceased later resold without asking leave, and without accounting to her for the proceeds. She admitted that she knew this and made no protest, and it was argued that I ought to infer from this that the same thing would have happened if he had wished to resell Peppermills. I decline to draw this inference.

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[1] [1958] 1 W.L.R. 259, 265; [1958] 1 All E.R. 523.

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There may well have been no advancement as regards the cottage, or she may have been unwilling to insist on her rights against a husband who was treating her with lavish generosity. Lastly, it was argued that he was in fact being generous not at his own expense, but at that of his defrauded clients, and that no presumption ought to be relied upon which involved a fraud. No authority was cited for this proposition and I feel bound to reject it. Whether the true owners of the securities sold to provide the purchase-money could follow it into the widow's hands is not a question which arises here. Moreover, it appears that they have all put in proofs against the trustee. I hold that this was a gift of the house to the widow. If the second alternative were to be accepted the position seems to me to turn out exactly the same.

The next question is whether the gift was voluntary or made for good consideration. It was not suggested that the widow did not act in good faith or that any knowledge or notice of the deceased's insolvency ought to be imputed to her. It was argued for the widow that the gift was made in consideration of marriage. No such suggestion was made before the hearing, but I then allowed an amendment of the defence to raise it. The assertion of gift has been consistently made on oath by the widow, from the Inland Revenue affidavit onwards through several affidavits in these proceedings and on her examination in the bankruptcy proceedings: nowhere is it suggested that consideration was given. The claim, therefore, must be jealously scrutinized. In the witness-box the widow said that no mention of a house was made before she had agreed to marry the deceased, and that she did not marry him on the strength of a promise to give her one. The highest at which she put it was that when they were engaged he said that they would have a house in the country which would be hers. No decision to buy Peppermills was made till after the marriage. She said, moreover, that when her husband told her the house was hers it was a surprise to her. She would speak of it, she said, as "our house," but he corrected her, saying, "your house." So far from proving that the gift was made in consideration of the marriage this testimony points the other way. The only serious evidence in support is in the already quoted letter of the deceased of February 14, 1955, which begins: "Under a contract of marriage with Mrs. Eichholz I am providing "a house for her," etc. This does not say when the contract was made: it may have been after marriage, and indeed it must have been if it was a contract to provide Peppermills, for that house was not decided on till February, 1955. This letter is altogether too ambiguous to support a contract in consideration of marriage. It was rather faintly suggested that consideration was given because the purchase-money was raised by a loan on a joint account for which the widow was liable, but the facts are that the securities which provided the purchase-money were already sold on the husband's order when the loan was made and the wife never was at risk. This point, moreover, is not open on the pleadings. Accordingly, I reject the argument that there was any consideration for the gift.

The next question is whether the trustee can set the transaction aside. It was admitted that in this court he could not rely on section 42 of the Bankruptcy Act, 1914, because of the decision of the Court of Appeal in *In re Gould.*[2] I will read the headnote: "Section 47 of the Bankruptcy Act, 1883, which "avoids certain voluntary settlements executed by a bankrupt, "does not apply to the administration of the estate of a deceased "insolvent by the Court of Bankruptcy under section 125 of the "Act." So held by the Court of Appeal, affirming Cave J. The trustee then relied on section 172 of the Law of Property Act, 1925, which is in these terms: "(1) Save as provided in this "section, every conveyance of property, made whether before or "after the commencement of this Act, with intent to defraud "creditors, shall be voidable, at the instance of any person "thereby prejudiced. (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for "the time being in force. (3) This section does not extend to any "estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good "faith to any person not having, at the time of the conveyance, "notice of the intent to defraud creditors." This section replaced 13 Eliz. 1, c. 5, which was repealed by the Act of 1925. The Elizabethan statute is, as one would expect, couched in very different terms. It is styled as "An Act against fraudulent "deeds, alienations, etc." and the long title is: "For the "avoiding and abolishing of feigned, covinous and fraudulent "feoffments, gifts, grants, alienations, conveyances, bonds, suits, "judgments and executions, as well of lands and tenements, "as of goods and chattels, more commonly used and practised "in these days than hath been seen or heard of heretofore: which "feoffments, gifts, grants, alienations, conveyances, bonds, suits,

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[2] (1887) 19 Q.B.D. 92.

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"judgments and executions, have been and are devised and "contrived of malice, fraud, covin, collusion or guile, to the end, "purpose and intent, to delay, hinder, or defraud creditors and "others of their just and lawful actions, suits, debts, accounts, "damages, penalties, forfeitures, heriots, mortuaries and reliefs, "not only to the let or hindrance of the due course and execution "of law and justice, but also to the overthrow of all true and "plain dealing, bargaining and chevisance between man and man, "without the which no commonwealth or civil society can be "maintained or continued." The Act then provides: "Be it "therefore declared . . . that all and every feoffment, gift, grant, "alienation, bargain and conveyance of lands, tenements, "hereditaments, goods and chattels, or of any of them, or of any "lease, rent, common or other profit or charge out of the same "lands, tenements, hereditaments, goods and chattels, or any of "them, by writing or otherwise, and all and every bond, suit, "judgment and execution, at any time had or made sithence the "beginning of the Queen's Majesty's reign that now is, or at any "time hereafter to be had or made, to or for any intent or "purpose before declared and expressed, shall be from henceforth "deemed and taken (only as against that person or persons, his or "their heirs, successors, executors, administrators and assigns, and "every of them, whose actions, suits, debts, accounts, damages, "penalties, forfeitures, heriots, mortuaries and reliefs, by "such guileful, covinous, or fraudulent devices and practices, as is "aforesaid, are, shall or might be in anywise disturbed, hindered, "delayed or defrauded) to be clearly and utterly void, frustrate, "and of none effect; any pretence, colour, feigned consideration, "expressing of use, or any other matter or thing to the contrary "notwithstanding."

There is no doubt that the Statute of Elizabeth was available after a man's death to his creditors to recover from a volunteer property of whatever kind, including, after the passing of 1 Vict. c. 110 (Judgments Act), cash. This sufficiently appears from the orders cited in Seton, Judgments and Orders, 7th ed., p. 2280. The action must be brought by a creditor in a representative capacity and was not available to executors: see Kerr on Fraud and Mistake, 7th ed., p. 305, and the cases cited on that page. It was not necessary to prove a fraudulent intent. The mere fact of insolvency was enough by itself: see Lord Hatherley's judgment in *Freeman* v. *Pope*.[3] The headnote to that case says:

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[3] (1870) L.R. 5 Ch. 538.

"When a settlement is not founded upon valuable consideration, "it may be set aside without proof of actual intention to defeat "or delay creditors, if the circumstances are such that the "settlement necessarily would have that effect; but, semble, the "mere fact that it has, in the event, prevented a creditor, who "was such when it was made, from obtaining payment of his "debt, is not of itself sufficient to enable him to set it aside." Lord Hatherley L.C. says[4]: "The principle on which the statute "of 13 Eliz. 1, c. 5, proceeds is this, that persons must be just "before they are generous, and that debts must be paid before "gifts can be made. The difficulty the Vice-Chancellor seems to "have felt in this case was, that if he, as a special juryman, had "been asked whether there was actually any intention on the "part of the settlor in this case to defeat, hinder, or delay his "creditors, he should have come to the conclusion that he had "no such intention. With great deference to the view of the "Vice-Chancellor . . . it appears to me that this does not put "the question exactly on the right ground; for it would never "be left to a special jury to find, simpliciter, whether the "settlor intended to defeat, hinder, or delay his creditors, "without a direction from the judge that if the necessary effect "of the instrument was to defeat, hinder, or delay the creditors, "that necessary effect was to be considered as evidencing an "intention to do so. A jury would undoubtedly be so directed, "lest they should fall into the error of speculating as to what "was actually passing in the mind of the settlor, which can "hardly ever be satisfactorily ascertained, instead of judging of "his intention by the necessary consequences of his act, which "consequences can always be estimated from the facts of the "case." Moreover, if the assets were considered to remain as part of the estate of the insolvent, then the person holding them is treated as executor de son tort: see May on Fraudulent Conveyances, 3rd ed. (1908), p. 18. That says: "When a man "makes a gift of goods which is fraudulent and void against his "creditors, and dies, he is considered to have died in full posses-"sion, with respect to the claims of the creditors: and the goods "are therefore assets in the hands of his personal representatives, "as to creditors. And as such a transfer is void at law, the "property becomes, at the death of the transferor, legal—and 'not merely equitable—assets for creditors; for, the deed being

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[4] L.R. 5 Ch. 538, 540.

"treated, as respects the creditors, as if it had never existed, "the property comes to the executor virtute officii. As any "intermeddling with a deceased person's effects, by one who is "not his duly constituted personal representative, makes the "latter an executor de son tort, and as goods fraudulently "alienated by a deceased person in his lifetime remain part of "his estate at his death, possession taken by the fraudulent "grantee will make him executor de son tort." In my judgment, all this continues to be good law under section 172 of the Law of Property Act, 1925, and it was at a late stage in the hearing admitted, though it was earlier strenuously contested, that the death of the fraudulent person makes no difference to his creditors' rights.

The defence ultimately rested on two points: first by an extension of the doctrine of *In re Gould* [5] it was argued that no such action lay after an order had been made under section 130 of the Bankruptcy Act, 1914 (which, for this purpose, may be taken to be equivalent to the similar sections of the Bankruptcy Acts of 1869 and 1883). Secondly, it was said that here there was no conveyance which could be set aside in the absence of any available written document. The first point is a strange one if good, for it means that the widow by making an application in bankruptcy ex parte and without notice to her husband's creditors, can put the property she acquired in fraud of them out of their reach. I can see no good reason why the *In re Gould* [6] doctrine should be applied to section 172. The headnote in that case is correct in stating that the decision was merely that the rights of a trustee in bankruptcy under section 42 of the Act of 1914 are not conferred on a trustee appointed under section 130. In other words, that part of the bankruptcy law is not imported by section 130 so as to be available where a man dies without being declared a bankrupt. It was said that some of the reasons expressed in the judgment in *In re Gould* [6] are equally applicable to section 172. The effect of section 130 was said to be not to enlarge the assets, but only to vary the creditors' rights, and so Cave J. says.[7] That was a motion in proceedings similar to the present, and Cave J.,[7] quoting from Fry J. in *In re D'Epineuil* [8] said [9]: "But, said Fry J., 'the words of the section are, that the "'rules of bankruptcy are to be applied in the administration of "'the assets; the assets in this case include only the equity of

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[5] 19 Q.B.D. 92.

[6] Ibid.

[7] Ibid. 94.

[8] (1882) 20 Ch.D. 217, 218.

[9] 19 Q.B.D. 92, 94.

" 'redemption of the goods comprised in the bill of sale; that may " 'be administered as part of his estate; what belonged to other " 'persons cannot be so administered . . . I grant this application " 'on the ground that the section is not intended to enlarge the " 'assets to be administered, but only to vary the rights of the " 'persons entitled to the assets.' " One reason for the decision was that no such right existed in an administration by the Court of Chancery, and that it would be anomalous to import it into an administration in bankruptcy. This reason, at any rate, does not apply to proceedings under section 172, and in fact that section has nothing to do with bankruptcy. A man whose estate is being administered under section 130 of the Bankruptcy Act cannot properly be described as a bankrupt. It would, indeed, be anomalous if proceedings under section 172 would lie while a Chancery administration was proceeding (as *Freeman* v. *Pope*,[10] already cited, clearly shows it does, and as indeed is also shown by *In re Mouat*[11] and *Taylor* v. *Coenen*[12]), but should cease to lie because the aid of section 130 was called in to regulate the creditors' rights. I reject this argument.

For the second point the difference in language between the Statute of Elizabeth and section 172 was relied on. This has given me more difficulty. The former statute expressly speaks of "by writing or otherwise," whereas the word "conveyance" in the modern statute no doubt suggests writing. It is to be remembered, however, that the section is dealing with property of all kinds, real as well as personal. That is shown in the definition clause, section 205 (xx): " 'Property' includes any thing in "action, and any interest in real or personal property." So conveyance cannot be confined to real estate or chattels real, but must apply to many kinds of property passing by delivery. Moreover, this is a consolidating Act and is not to be taken as making an alteration in the law unless the words admit of no other interpretation—see Scrutton L.J. in *Gilbert* v. *Gilbert*,[13] quoting Sargant J. The Lord Justice says[14]: "The question is whether "words in an Act consolidating the law have the effect of "amending the law. The presumption with which one starts "is that a consolidating Act is not intended to alter the law. "An example of that rule is to be found in *Mitchell* v. *Simp-* "*son*,[15] in which Fry L.J. said: 'The Sheriffs Act, 1887, is a

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[10] L.R. 5 Ch. 538.
[11] [1899] 1 Ch. 831.
[12] (1876) 1 Ch.D. 636.
[13] [1928] P. 1, 8.
[14] Ibid.
[15] (1890) 25 Q.B.D. 183.

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" 'consolidating Act, and does not profess to amend or alter the " 'provisions of the Acts consolidated. Prima facie, therefore, " 'the same effect ought to be given to its provisions as was " 'given to those of the Act for which it was substituted.' " It may be, however, that the language of the Act is so clearly " different from that of the previous statute as to bring about an " alteration in the law, as in *MacConnell* v. *E. Prill & Co.*,[16] " where Sargant J. said [17]: 'No doubt the prima facie presump- " 'tion in the case of a consolidating Act, such as the present Act " 'of 1908, is that the legislature intended to reproduce the " 'existing position, and my first inclination would be to hold " 'that, as under section 129 (3) of the 1862 Act, any notice " 'is sufficient which sufficiently informs shareholders of the " 'intention to act by way of extraordinary resolution. But this " 'prima facie view must yield to plain words to the contrary.' "

To the like effect is the view of Romer L.J. in *In re Turner's Will Trusts, District Bank Ltd.* v. *Turner.*[18] The Lord Justice says this [19]: " For this purpose it is of importance to observe that " the Trustee Act, 1925, is a consolidation Act. It is intituled " 'An Act to consolidate certain enactments relating to trustees " 'in England and Wales.' It is therefore extremely unlikely, to " say the least of it, that it effected any substantial change in the " pre-existing law."

The language of the two sections is, of course, strikingly different. Mr. Christie drew my attention to the judgment of du Parcq L.J. in *Riches* v. *Westminster Bank Ltd.*[20] His Lordship was considering the Law Reform Act, 1934, which repealed part of the Civil Procedure Act, 1833, and he said [21]: " Citations from cases referring to sections 28 and 29 of the Civil " Procedure Act, 1833, are, in my opinion, of doubtful assistance. " Indeed, I am of opinion that when the legislature has repealed " a statute and has not re-enacted it, but replaced it with a new " enactment in different terms, it is in general a salutary rule " that such case law as has accumulated round the repealed " statute should be regarded as having expired with it." That, however, was not a case about a consolidating Act. It might have been quite different if section 172 of the Law of Property Act, 1925, had been part of the Law of Property Act, 1922, which, of course, made revolutionary changes in the law. It would, indeed, be a revolution in law if the effect of section 172 were to enable a man to convert the property which he wished to dispose of in fraud of his creditors into (say) bearer bonds, and to hand those to volunteers with impunity.

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[16] [1916] 2 Ch. 57.

[17] Ibid. 63.

[18] [1937] Ch. 15; [1936] 2 All E.R. 1435.

[19] [1937] Ch. 15, 24.

[20] [1945] Ch. 381; [1945] 2 All E.R. 111.

[21] [1945] Ch. 381, 388.

There is, however, a further stumbling block in section 205, the definition section, which reads in this way: " (1) In this Act, " unless the context otherwise requires, the following expressions " have the meanings hereby assigned to them respectively, that " is to say:— . . . (i) ' Conveyance ' includes a mortgage, charge, " lease, assent, vesting declaration, vesting instrument, dis- " claimer, release and every other assurance of property or of an " interest therein by any instrument, except a will; . . ." Reliance was placed on this to show that " conveyance " of necessity implies writing. It is possible to confine the allusions to instruments to the latter part of the phrase, though the word " other " is against this. Some of the words in the earlier part do not necessarily import writing, for instance, " charge," " lease " (three years), " assent " (as applied to chattels). Apart from this, the clause is not truly one of definition. It will only operate where the context allows. It uses the word " includes," and this implies " inter alia " and is a word apt to extend the normal meaning of the word " conveyance ": see Lord Watson, delivering the judgment of the Privy Council in *Dilworth* v. *Commissioner of Stamps.*[22] He was there considering an Act which had this term in it: " In this Act, the term ' charitable purposes ' includes " devises, bequests and legacies of real or personal property," and so on. Lord Watson said[22]: " Section 2 is, beyond all " question, an interpretation clause, and must have been intended " by the legislature to be taken into account in construing the " expression ' charitable devise or bequest,' as it occurs in sec- " tion 3. It is not said in terms that ' charitable bequest ' shall " mean one or other of the things which are enumerated, but " that it shall ' include ' them. The word ' include ' is very " generally used in interpretation clauses in order to enlarge " the meaning of words or phrases occurring in the body of the " statute; and when it is so used these words or phrases must " be construed as comprehending, not only such things as they " signify according to their natural import, but also those things " which the interpretation clause declares that they shall include.

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[22] [1899] A.C. 99, 105.

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"But the word 'include' is susceptible of another construction, "which may become imperative, if the context of the Act is "sufficient to show that it was not merely employed for the "purpose of adding to the natural significances of the words "or expressions defined. It may be equivalent to 'mean and "'include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must "invariably be attached to these words or expressions."

In my judgment the first meaning ought to be attached here to the word "include." On the whole I am of opinion that in a consolidating Act I should be entitled to say that writing is not a sine qua non for the word as it appears in section 172, though I do not pretend that the wording of the section is happy if so construed. I was reminded that dispositions void under section 172 have for many years been commonly described as "fraudulent conveyances," whether the disposition in question be oral or in writing. For example, the title of May, the leading book, reads on the spine "May on Fraudulent and Voluntary "Dispositions," but when one turns to the title page one finds "Law of Fraudulent and Voluntary Conveyances; being a Treatise "on the Statute of Elizabeth." In a modern textbook, Kerr on Fraud and Mistake, 7th ed., p. 304, a view is expressed on this subject in these terms: "The section [section 172] applies to "every conveyance of property. 13 Elizabeth, Chapter 4, employed several words more or less synonymous with conveyance "and several words more or less synonymous with property. There "is no reason to suppose that the new section is in any respect "narrower or wider than the old statute. Early decisions under "the statute limited its application to property which could be "taken to satisfy debts, and the long historical development by "which almost all property can now be taken in satisfaction of "its owner's debts is traced in the preceding edition of this book. "It is now safe to say that the section applies to any property." Being the writer of a textbook, the author no doubt felt a little more confident than those who have to come into court and argue the point, but that was his opinion.

In the end, however, I have come to the conclusion that the point is a false one. There is no want of writing; it exists in the assurance to the wife of March 15, 1955. It is true that, quoad the vendor, this was made for valuable consideration, that the deceased was not a party, and that no direction by him is recited in it. In fact, however, the vendor having contracted with the deceased for the sale of the property to him, was no more than a trustee with a vendor's lien; the equitable interest was in the husband under the contract. The assurance passed to the widow not only the vendor's legal estate but the deceased's equitable interest, and it is this which can be recovered by the creditors. The deed should be set aside quoad the creditors. This proposition has the authority of a decision of Page Wood V.-C. in *Barton* v. *Vanheythuysen*,[23] a case under 13 Eliz. 1, c. 5, where that course was taken. I quote from the sidenote[23]: "A debtor "having contracted to purchase an estate, caused the conveyance "to be made to trustees, and trusts to be declared by deeds, "dated in March, 1850, which recited the agreement of the "debtor for the purchase, and that the conveyance to the trustees "was by his direction, and declared the trusts to be for the sale "of the property, and retaining the proceeds for the benefit of "the wife and children of the debtor. By one of the deeds of "March, 1850, the debtor also assigned to the same trustees all "the furniture in certain houses (one of which was on the pur"chased estate), upon the same trusts, for his wife and children." There are other matters in the case, but it does not appear that the purchaser of the property, Richard Edward Vanheythuysen, was a party to the deed. It merely states[23]: "By a deed, dated "March 25, 1850, reciting that he had contracted to purchase "such estate, the premises were 'by the direction of the said "'R. E. Vanheythuysen' conveyed, by the vendor, unto and "to the use of the" defendant trustees. The Vice-Chancellor deals with it in this way[24]: "Two objections have been raised "to the claim of Messrs. Stone under the deed of November 29, "1851, and by force of the statute 27 Eliz. 1, c. 4. It was first "said that the conveyance of March 25, 1850, did not vest any "property in Vanheythuysen, and that it was not a grant or "settlement of real estate by him, so as to bring the case within "the provisions of the statute 27 Eliz. 1 [that is the correspond"ing statute about subsequent encumbrance] by which such a "conveyance would be subsequently avoided. It was argued "that the purchase of an estate by a payment in the name of a "child was not within the statute and that Vanheythuysen did "not, in this case, actually acquire the estate, but that it was "in effect nothing more than giving the money to the wife and "child, who by that means bought the estate; and text-writers "have questioned whether such a purchase would be within the

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[23] (1853) 11 Hare 126.

[24] Ibid. 129.

"statute. But, in the present case, the conveyance recites that "Vanheythuysen had agreed to purchase the estate from the "vendor, and thereby acquired the equitable interest in the "estate; and the conveyance is, therefore, clearly a conveyance "of his equitable interest in this estate to volunteers." The decree in that case was in these terms: "This court doth declare "that the deed of conveyance of the 25th day of March, 1850 "(so far as the same relates to the equitable fee simple . . . of "Richard Edward Vanheythuysen, deceased, in the freehold . . . "lands and premises therein comprised) . . . are void as against "[the creditors] in the second-mentioned clause, claiming under "the deed or mortgage . . ." It seems to me that with a little adaptation a declaration in those terms would exactly fit the present circumstances.

There remains the question whether the trustee under section 130 of the Bankruptcy Act, 1914, can maintain the action which, as I have said, was, under the old statute, an action brought by a creditor in a representative capacity, and if after a decree for administration in Chancery brought with the leave of the court. It was argued that the judgment in *In re Gould*[25] shows that the trustee under section 130 is merely appointed to administer the assets already included in the estate, and not to enlarge those assets by getting in property in other hands. It seems doubtful whether those statements, which were not necessary for the decision, are consistent with the other passages I have read, which show that property fraudulently conveyed is not considered to remain part of the estate of the deceased and that those in whose hands it was were treated as executors de son tort. It was also said that in bankruptcy only the trustee may bring proceedings: see a decision of Upjohn J. in *In re Crossley*.[26] This is no doubt true, but this is not a bankruptcy in the ordinary sense of the word, and if, contrary to my view, the trustee is not the proper party to bring the action, I see no reason why this defect should not be remedied by adding a representative creditor as plaintiff. This objection, in my view, is nothing more than an objection as to parties and can, if necessary, be remedied with the leave of the court, which I should be prepared to give. In my judgment, however, it is not necessary and the action will lie as it stands.

It follows from what I have said that the trustee succeeds in

[25] 19 Q.B.D. 92.

[26] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 296.

both action and motion. There is no need to distinguish between the chattels given to the widow and the chattels which remained the husband's property. There may be some which were wedding presents or the like which the widow can retain, and I propose to give liberty to apply for an inquiry on this question if there are differences which cannot be composed.

There will have to be two orders, one in bankruptcy and one in Chancery.

Orders accordingly.

Solicitors: *Sidney Pearlman; Robin Howard & Co.*

P. P.

FREDERICK LAWRENCE LTD. *v.* FREEMAN, HARDY & WILLIS LTD.

[1958 J. No. 3887.]

C. A.

1959
June 3, 4, 5, 8; *July* 2.

Lord Evershed M.R., Romer and Pearce L.JJ.

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to occupy for own purposes—Purchase within five years—Meaning of "purchased"—Meaning of "created"—"Termination of the current tenancy"—Meaning—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24, 25, 30 (1) (*g*), (2), 31, 33, 64.

By an underlease of 1933, business premises were demised for a term expiring on March 22, 1959. That underlease had become vested in the applicants, the tenants. By a lease dated March 10, 1952, the premises were demised to S. Ltd. for the term of 99 years subject to the underlease of 1933. By an agreement dated June 30, 1954, entered into between S. Ltd. and the present landlords of the premises, after reciting that S. Ltd. had agreed "to sell" and the landlords had agreed "to purchase" the goodwill of the business carried on by S. Ltd. together with certain freehold and leasehold premises it was provided that the consideration for the sale should be attributed between the freehold and leaseholds, which latter included the business premises, as therein provided. No sum was attributed to certain of the leasehold properties which included the business premises. Pursuant to that agreement by a transfer of November 1, 1954, the business premises were transferred to the landlords. No consideration was expressed for the transfer but it contained a declaration that the covenants implied under section 77 (1) (*c*) of the Law of Property Act, 1925, should be deemed to be incorporated in it. That transfer was registered at the Land

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Registry on November 13, 1954. On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating their tenancy on March 22, 1959, and stating that they would oppose an application for the grant of a new tenancy on the ground that, on the determination of the tenancy, the landlords intended to occupy the premises for the purposes of a business to be carried on by them, being ground (*g*) of section 30 (1)[1]. The tenants applied for a new lease contending that the landlords were precluded from opposing the application for a new lease since the interest of the landlords was "purchased "or created" after the beginning of the period of five years which ended with the "termination" of the tenants' "current "tenancy":—

Held, (1) that in section 30 (2) of the Landlord and Tenant Act, 1954, the word "created" was referable to the creation of the landlord's interest and not to the creation of the landlord's title to it and, accordingly, that the reversionary interest of the landlords, expectant on the termination of the tenants' underlease, was created by the lease of March 10, 1952.

(2) That "purchased" in section 30 (2) meant "bought for "money" and did not include the acquisition of property in consideration of giving a covenant, and that the transfer to the landlords of the reversionary lease in consideration of the covenants

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[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "under subsection (1) of section 24 "of this Act are such of the following grounds . . . (*g*) subject as "hereinafter provided, that on the "termination of the current tenancy "the landlord intends to occupy the "holding for the purposes, or partly "for the purposes, of a business to "be carried on by him therein, or "as his residence.

"(2) The landlord shall not be "entitled to oppose an application on "the ground specified in paragraph "(*g*) of the last foregoing subsection "if the interest of the landlord, or "an interest which has merged in "that interest and but for the merger "would be the interest of the land-"lord, was purchased or created "after the beginning of the period of "five years which ends with the ter-"mination of the current tenancy, ". . ."

S. 64: "(1) In any case where— "(*a*) a notice to terminate a tenancy "has been given under Part I or "Part II of this Act or a request for "a new tenancy has been made under "Part II thereof, and (*b*) an applica-"tion to the court has been made "under the said Part I or the said "Part II, as the case may be, and "(*c*) apart from this section the effect "of the notice or request would be to "terminate the tenancy before the "expiration of the period of three "months beginning with the date on "which the application is finally dis-"posed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the "said period of three months and not "at any other time.

"(2) The reference in paragraph "(*c*) of subsection (1) of this section "to the date on which an application "is finally disposed of shall be con-"strued as a reference to the earliest "date by which the proceedings on "the application (including any pro-"ceedings on or in consequence of an "appeal) have been determined and "any time for appealing or further "appealing has expired, except that if "the application is withdrawn or any "appeal is abandoned the reference "shall be construed as a reference to "the date of the withdrawal or aban-"donment."

moving from the landlords implied under section 77 (1) (*c*) of the Law of Property Act, 1925, if it stood alone, would not have constituted a "purchase" by the landlords of the reversion expectant on the tenancy.

H. L. Bolton (Engineering) Co. Ltd. v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624 followed; *Inland Revenue Commissioners* v. *Gribble* [1913] 3 K.B. 212; 29 T.L.R. 418 applied.

(3) That, in order to understand the true nature of the transaction by which the landlords acquired the reversion, it was permissible to look to the contract, which preceded the transfer, to see whether the reversionary interest was "purchased" by the landlords, and that the agreement of June 30, 1954, was one single agreement and could not be split into different parts and was a contract of sale and accordingly the landlords were purchasers.

(4) That the landlords "purchased" the relevant interest on June 30, 1954, the date of the agreement for sale.

(5) That the provisions of section 64 (1) of the Act (which extend a tenancy for a period of three months from the date when an application for a new tenancy is finally disposed of) had not to be read into section 30 (2), and that the phrase "the termination of the current tenancy" was referable to the date specified in the landlords' notice under section 25 and, accordingly, that the landlords' interest had been purchased within five years of the termination of the tenants' current tenancy and the landlords were not entitled to oppose the tenants' application for the grant of a new tenancy.

In re 88, High Road, Kilburn [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527 considered.

Decision of Roxburgh J. affirmed.

APPEAL from Roxburgh J.

By an underlease dated December 30, 1933, J. Sears & Co. (True Form Boot Co.) Ltd. (hereinafter called "Sears Ltd.") demised to F. J. Cartwright Ltd. business premises known as 167 and 169, High Street, Camden Town, for a term expiring on March 22, 1959. That term was by an assignment of November 29, 1934, vested in the applicants, Frederick Lawrence Ltd., the present tenants. By a reversionary lease of March 10, 1952, the premises were demised to Sears Ltd. for a term of 99 years subject to the tenancies affecting the premises.

By an agreement dated June 30, 1954, it was recited that Sears Ltd. had carried on business as manufacturers and retailers of footwear for many years and that in relation to that business they were the owners of various freehold and leasehold properties. It was further recited that Sears Ltd. had agreed to "sell" and Freeman, Hardy & Willis Ltd. to "purchase" the business and certain freehold and leasehold premises (which included 167 and

169, High Street, Camden Town). The consideration for the "sale" and "purchase" was expressed to be for the freehold properties £480,050, for certain leasehold properties £149,000 and for other leasehold premises, which included 167 and 169, High Street, Camden Town, the covenant by Freeman, Hardy & Willis Ltd. to observe and perform the covenants contained in the leases under which the several properties were held.

Pursuant to that agreement by a transfer of November 1, 1954, that reversionary lease was assigned to Freeman, Hardy & Willis Ltd. the present landlords. No consideration was expressed in the transfer but it contained a declaration that the covenants implied by section 77 (1) (*c*) of the Law of Property Act, 1925 (being covenants to pay rent and observe the covenants of the lease and to indemnify the assignor) should be deemed to be incorporated therein. Upon the registration at the Land Registry of the transfer on November 13, 1954, the landlords became entitled to the leasehold reversion expectant upon the determination of the tenants' tenancy.

On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating the tenancy on March 22, 1959. The landlords stated that they would oppose any application by the tenants for the grant of a new tenancy on the ground that the landlords intended to occupy the premises for the purposes of a business to be carried on by them, being ground (*g*) in section 30 (1) of the Act. On July 18, 1958, the tenants applied for a new lease.

While it appeared from the evidence that the landlords had established their ground of opposition under section 30 (1) (*g*) of the Act of 1954, the tenants contended that the landlords were not entitled, having regard to the provisions of subsection (2) of section 30 to rely on that ground specified in (*g*), since the interest of the landlords had been "purchased" or "created" after the beginning of the five-year period which ended with the termination of the tenants' current tenancy.

Roxburgh J. held that the landlords' interest had been "created" within the five-year period and that section 30 (2) applied.

The landlords appealed and the tenants gave notice that they would contend that the landlords had "purchased" the premises within the five-year period.

Lionel Blundell Q.C. and *Ronald Bernstein* for the landlords. It is conceded that the landlords intend to occupy these premises for the purpose of a business to be carried on by them being ground (*g*) in subsection (1) of section 30 of the Landlord and Tenant Act, 1954. The sole question is whether they are precluded from relying on that ground by reason of the provisions of subsection (2) of section 30, which provide that a landlord shall not be entitled to oppose a tenant's application on ground (*g*), if the landlord's interest " was purchased or created after the beginning of the " period of five years which ends with the termination of the " current tenancy." The answer to that question depends on whether the landlords' interest was " purchased " or " created " at all and, if it were, what was the date of such purchase or creation.

The judge did not hold that the landlords' interest was " purchased " within the five-year period but that it was " created " within that period, and, accordingly, that the landlords could not rely on ground (*g*). The tenants have given a cross-notice that they will contend that the landlords' interest was " purchased." The judge held that the landlords' interest was " created " not when the reversionary lease was granted in 1952 but when that lease became vested in the landlords on November 13, 1954, on the assignment in their favour being registered in the Land Registry. The landlords contend that the phrase " purchased or " created " means what it says, and that a leasehold interest is " created " when the lease is granted. There is a gap here in the Act. An interest is " purchased " when it is acquired. The landlords' interest was created in 1952 outside the five-year period.

If November 13, 1954, is the relevant date, being the date of the registration of the transfer, then the landlords are not outside the five-year period. If the transfer had not been made, then the case would have been within section 42 (3) of the Act of 1954. That section has some bearing on the case. The transfer of November 1, 1954, to the landlords was not a conveyance for valuable consideration. That transfer was made to give effect to the agreement of June 30, 1954. The judge rejected that agreement as irrelevant. If there was a purchase here, the date of the purchase was the date of that agreement.

It is further submitted that the date of " the termination of " the current tenancy " for the purposes of subsection (2) is three months after the date of judgment or the expiration of the right of appeal. The parties agreed that there should be no further evidence. The landlords submit that they have a good case on the documents. [Reference was made to *H. L. Bolton* (*Engineering*)

Co. Ltd. v. *T. J. Graham & Sons Ltd.*[2]; *Inland Revenue Commissioners* v. *Gribble*[3]; *Robshaw Bros. Ltd.* v. *Mayer*[4]; *Simpson* v. *Connolly*[5]; *Baker* v. *Lewis*[6]; *Powell* v. *Cleland.*[7]]

Turning to a consideration of the agreement of June 30, 1954. It appears that the leasehold premises were not sold for money. The transfer to the landlords was expressed to be in consideration of their covenants under section 77 (1) (*c*) of the Law of Property Act, 1925. The decision in *Robshaw Bros. Ltd.* v. *Mayer*[8] shows that a transfer of leaseholds in consideration of the transferee entering into such covenants is not a sale. It does not follow because other properties were sold that these leaseholds were also sold. No moneys passed on their transfer. It is necessary to have been a purchaser of the property for subsection (2) of section 30 to apply. There was no purchase here: see *Edwardes* v. *Barrington.*[9]

Alternatively, if the contract can be looked at to see what was in the contemplation of the parties, it appears that there was no purchase of the leaseholds. The bargain for their transfer was different to that made in respect of the other properties. They were to be transferred in consideration of the assignees' covenants, implied by section 77 (1) (*e*). If, contrary to that submission, there was a purchase here, the further question arises as to what was the date of it. There are three possible dates: the date of the agreement for sale, the date of the transfer and, lastly, the date when it was registered at the Land Registry. The purchase stems from the date of the agreement to sell. Once there is a binding contract the vendor is a trustee for the purchaser. The landlord becomes the equitable owner of the property: *Emberson* v. *Robinson.*[10] The position under the Rent Acts is different to that under the Landlord and Tenant Act, 1954. A purchaser has the rights of landlord from the date of the contract: *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[11] The meaning of landlord in Part II is the same as in Part I of the Act of 1954. Sections 24 (1), 25 and 26 show how a tenancy may be terminated. "Date of termination" in section 46 has the same meaning assigned to it in section 26 (1). "The date of termination" has the same significance throughout the Act. The current tenancy will end for all purposes on the same day. The period of five years for the purposes of subsection (2) of section 30 is to be calculated by reference to the determination of the current tenancy. Having regard to section 64, that cannot be earlier than three months from the delivery of judgment by the Court of Appeal. The ultimate date of termination cannot now be foretold since there may be an appeal to the House of Lords. That possibility, however, can be disregarded as an unknown contingency. The court should have regard to the known facts and treat the termination of the current tenancy as being under section 64 the expiration of three months from the date of the judgment of this court.

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[2] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[3] [1913] 3 K.B. 212; 29 T.L.R. 481.

[4] [1957] Ch. 125; [1956] 3 W.L.R. 1049; [1956] 3 All E.R. 833.

[5] [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474.

[6] [1947] K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 592.

[7] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

[8] [1957] Ch. 125; [1956] 3 W.L.R. 1049.

[9] (1901) 85 L.T. 650; 18 T.L.R. 169.

[10] [1953] 1 W.L.R. 1129; [1953] 2 All E.R. 755.

[11] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

In re 88, High Road, Kilburn [12] Wynn-Parry J. held that the provisions of section 64 had to be read into section 33 for the purpose of determining the date from which a new lease granted under the Act began. If Parliament had intended that in section 30 (2) "termination of the tenancy" should mean the date of the landlords' notice it would have said so.

The purpose of subsection (2) is that a tenant shall enjoy security for five years, that period should be measured from the date when the tenant is disturbed but not from any other date. The period of five years' security should be fixed by reference to section 64. [Reference was made to *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd. (No. 2)*.[13]]

Since a landlord may formulate his intention to reconstruct the premises at any time before judgment, it is not unreasonable that his rights under paragraph (*g*) should also be kept open. The landlords are not contending for a construction of subsection (2) which would make it unworkable. When the case comes before the court, it is then that the landlords' rights fall to be determined. The court is asked to assume that the tenancy will determine at the earliest possible date on the known facts, if at that date the landlords' purchase is outside the five-year period, then they are entitled to the benefit of paragraph (*g*).

The appeal is a rehearing. The date of the creation of the new tenancy under the Act should be the date of the termination of the old: *Cornish* v. *Brook Green Laundry Ltd.*[14]

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[12] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

[13] [1956] 1 W.L.R. 1339; [1956] 3 All E.R. 490.

John Arnold Q.C. and *Allan Heyman* for the tenants. It is not contended that the landlords' interest was "created" within the five-year period, but that it was so "purchased." It would be a startling result if the manner in which the purchase money was apportioned in a sale agreement should make part of the assets disposed of the subject of a purchase and others not. Here there was one consideration paid for the sale by Sears Ltd. It does not matter how the purchase price was apportioned between the various assets, if the total consideration is correct. But each property cannot be considered in isolation. There was, in fact, one consideration paid for all the properties sold. If that is right, the form of the transfers completing the transaction cannot alter its essential characteristics. Here there was one sale for one consideration and not a series of sales.

There remains the question whether in subsection (2) "purchased" in the context refers to a sale in the commercial sense, or to a sale for money or money's worth. It is submitted that what is meant is a sale in a commercial sense. The method of computation does not affect the fact that the leaseholds were purchased for money. The *Gribble* case[15] contains, in Buckley L.J.'s dissenting judgment, an analysis of what may be meant by purchased. It has four possible meanings. This agreement was a commercial bargain and fell within one definition of purchase. It is difficult to see why a landlord who buys for cash should be disqualified by subsection (2), and one who buys for shares should not. Denning L.J.'s observations in the *Bolton* case[16] did not lay down any general principle. [Reference was made to *Baker* v. *Lewis*[17]; *Powell* v. *Cleland*[18]; *Robshaw Bros. Ltd.* v. *Mayer.*[19]] A commercial consideration for a sale need not be money or money's worth. In *Newton Abbot Co-operative Society Ltd.* v. *Williamson & Treadgold Ltd.*[20] it took the form of a restrictive covenant. "Purchase" is defined in the Shorter Oxford Dictionary as to acquire by the payment of money or its equivalent.

If the court were to hold that in subsection (2) "purchased" meant to acquire for money or money's worth, it is submitted that the covenant of indemnity is money's worth.

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[14] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 373.

[15] [1913] 3 K.B. 212, 220.

[16] [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[17] [1947] K.B. 186.

[18] [1948] 1 K.B. 262.

[19] [1957] Ch. 125; [1956] 3 W.L.R. 1049; [1956] 3 All E.R. 833.

[20] [1952] Ch. 286; [1952] 1 All E.R. 279.

The next point is as to the terminus a quo for the calculation of the five-year period. *Emberson* v. *Robinson*[21] was a different and very special case. The right date for starting the running of the five years is the date when the purchase is completed by the registration of the title in the Land Registry.

The last point is as to the determination of the tenancy. There is no middle position. The date of determination is either the date when the landlords' notice expires or the date three months after the determination of the hearing of the last court to deal with the tenants' application.

This is a question of construction. Section 46 is an important section. The proviso to section 25 (1) only operates to qualify section 25. It does not derogate from the definition section.

The current tenancy terminates on the date specified in the landlords' notice, and the termination is not affected by the provisions as to the interim continuation of tenancies pending disposal of proceedings before the courts. That view is supported by section 26, which shows a deliberate intention to continue the tenancy (in the sense of occupation) down to the date at which the terms of the tenancy are known, plus three months. In section 37 a special definition was needed because the "quitting "of the holding" could occur in either of two ways. *In re 88, High Road, Kilburn*,[22] is distinguishable. It was concerned with a different section, section 33, where the relevant expression was "end of the current tenancy." That is perhaps less a term of art than "termination" of the tenancy. Alternatively, it is submitted that that case was wrongly decided. The side effects of that decision could hardly have been brought to the attention of the judge. The effect of the contrary view are so extravagant that the court should seek to avoid that construction. [Reference was made to Maxwell, 10th ed., p. 3.]

[ROMER L.J. In *Coutts & Co.* v. *Inland Revenue Commissioners*[23] Lord Reid subscribed to the view that where there are two possible constructions of a statute, the court would prefer the construction which avoids an absurdity resulting from the other.]

[LORD EVERSHED M.R. It is difficult to say that the tenancy is "terminated" when the Act says that it is being continued.]

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[21] [1953] 1 W.L.R. 1129; [1953] 2 All E.R. 755.

[22] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

[23] [1953] A.C. 267, 281; [1953] 1 All E.R. 418.

It may be that the "current tenancy" is not being continued. But in any case it is not really necessary to embark on the conception of the tenancy being continued.

"Termination," for the purpose of ascertaining the period specified in section 30 (2), has a limited and artificial meaning.

Lionel Blundell Q.C. in reply. It is significant that the definition of "date of termination" in section 46 refers only to section 25 (1) and not to section 26. Where a notice under section 26 has been served the tenancy "comes to an end." "Date of termination" has a technical meaning referring to the date written in the notice and chosen by the landlord. Except where a section 26 notice has been served, the proviso to section 25 (1) operates to bring in section 64. In section 30 there are a number of references to the "termination of the tenancy" but not to the "date of" termination. Sub-paragraphs (*e*), (*f*) and (*g*) of section 30 (1) refer to the date when the landlord gets possession, which is after the end of any section 64 continuance. Section 37 is concerned with those grounds and that emphasises that there is a distinction between "termination" and "date of "termination." The scheme of the Act is to preserve the whole of the tenant's rights so long as he is protected by the Act.

Section 30 (2) measures something by reference to the termination of the current tenancy. The purpose of the section is apparently to secure to the tenant at least five years' security after the landlord acquires his interest. Just as the contractual date of the termination has gone because of section 24, so the date specified in the landlord's notice or the tenant's request has gone once the provisions of section 64 have begun to operate.

There is no middle course between accepting the date in the notice or the period after section 64 has been satisfied. Section 64 cannot be disregarded and the date in the notice resuscitated, for by the plain terms of the Act it has no longer any effect at all. It would need express words to revive it.

As regards the suggested example of an exchange after the purchase, it is submitted that, as under the Rent Acts (see *Lucas* v. *Lincham*[24]), a landlord cannot overcome his disability by passing his interest to someone else. In deciding whether this was a purchase one should look at what was actually done, disregarding how the parties described the transaction. This is a composite transaction, part sale and part a transfer from one company to another on the terms set out. The parties carefully dealt

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[24] [1950] 1 K.B. 548; 66 T.L.R. (Pt. 1) 641; [1950] 1 All E.R. 586.

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separately with the various properties. There may have been a sale of certain of them and not of others. No money consideration was paid for the transfer of these leaseholds, the landlords merely taking over the liability under the lease. It would be artificial to give a money value to that liability. The question is whether the probability that the non-monetary transactions would not have been entered into but for the sales of the other properties has the effect of making the non-monetary transactions "sales." It is submitted that although a transaction is wrapped up in a larger project that would not make it a sale, if it would not be one otherwise. [Reference was made to *Emberson* v. *Robinson.*[25]]

The Act is not directing the court to find the date of acquisition but of purchase. The purchase was when the parties entered into the contract. Having regard to the intention of the section, there is no reason why the time taken in deducing title, etc., should be disregarded. That is only the machinery necessary to carry the bargain into effect.

[ROMER L.J. On the *Walsh* v. *Lonsdale*[26] principle that might be the date when the interest was "created."]

If a contract goes off, the date on which it was made would not, of course, have any relevance so far as this section is concerned. One can only rely on a contract which has been carried into effect so as to vest in the landlords the legal reversion. The transfer gave the landlord the right to be entered on the register as absolute proprietor. The relevant time is not when the legal estate vested but when it was purchased.

Cur. adv. vult.

July 2. LORD EVERSHED M.R. The judgment which Romer L.J. will deliver is the judgment of the court.

ROMER L.J. This appeal arises out of an application by Frederick Lawrence Ltd., who are the tenants of No. 167 and the upper floors of No. 169, High Street, Camden Town, Middlesex, for a grant of a new tenancy of those premises for a period of 14 years from March 22, 1959. The application was made under section 24 of the Landlord and Tenant Act, 1954, and the respondents to the application were Freeman, Hardy & Willis Ltd. (hereinafter referred to as "the landlords"). The landlords opposed the application on the ground specified in paragraph (*g*) of section 30 (1) of the Act. The matter came before Roxburgh J., and by his order dated February 6, 1959, the judge declared that by virtue of section 30 (2) of the Act the landlords were not entitled to oppose the tenants' application. The landlords appeal against that order.

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[25] [1953] 1 W.L.R. 1129.

[26] (1882) 21 Ch.D. 9.

The facts are not in dispute. By an underlease dated December 30, 1933, J. Sears & Co. (True Form Boot Co.) Ltd. (hereinafter referred to as "Sears Ltd.") demised the premises to F. J. Cartwright Ltd. for a term of 25 years (less the last three days) from March 25, 1934. On November 29, 1934, that lease was assigned to the tenants and remained vested in them on the expiry of the term on March 22, 1959. By a lease dated March 10, 1952, the premises were demised to Sears Ltd. for the term of 99 years, subject to the tenancies affecting them, and on November 1, 1954, the premises so demised were transferred (being registered land) to the landlords for the unexpired residue of the term. Upon the registration of this transfer on November 13, 1954, the landlords accordingly became entitled to the leasehold reversion in the premises expectant upon the termination of the applicants' underlease and were still so entitled on March 22, 1959.

On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Act of 1954 terminating their tenancy on March 22, 1959, and intimating that they would oppose an application to the court for the grant of a new tenancy on the ground that, on the termination of the current tenancy, they (the landlords) intended to occupy the premises for the purposes of a business to be carried on by them. On July 18, 1958, the tenants applied for a new lease, and affidavit evidence was filed by both parties. As a result of this evidence, it was plain that the landlords had established their ground of opposition, as stated in the notice which they had served on the tenants (which was, in fact, the ground specified in section 30 (1) (*g*) of the Act), and the tenants did not contend to the contrary. The tenants objected, however, that the landlords were precluded from opposing their application by the provisions of section 30 (2) of the Act, which are in the following terms: "The landlord shall not "be entitled to oppose an application on the ground specified in "paragraph (*g*) of the last foregoing subsection if the interest of "the landlord, or an interest which has merged in that interest "and but for the merger would be the interest of the landlord, "was purchased or created after the beginning of the period of "five years which ends with the termination of the current "tenancy, and at all times since the purchase or creation thereof "the holding has been comprised in a tenancy or successive "tenancies of the description specified in subsection (1) of "section 23 of this Act."

The tenants' contention was that the interest of the landlords was (in the formula of the subsection) purchased or created after the beginning of the period of five years which ended with the termination of the tenants' current tenancy. Their case was that the relevant five-year period commenced in November, 1954, when the landlords took a transfer of the reversionary interest, and that their own current tenancy terminated on March 22, 1959, which was the date of termination specified in the notice which the landlords had served on them pursuant to section 25 of the Act.

The judge decided the question in the tenants' favour. He did so on the ground that whether or not the landlords had "purchased" their interest within the five-year period (a point which he found unnecessary to decide), the interest had been "created" within that period and that section 30 (2) accordingly applied. On the appeal coming on before this court Mr. Arnold, for the tenants, intimated that he desired to support the judge's order on the ground that the landlords had "purchased" their interest within the five-year period, rather than on the ground that it had been "created" within that period. He conceded that the "interest" of the landlord, namely, the reversion expectant on the termination of the applicants' tenancy, had been "created" by the lease, hereinbefore referred to, of March 10, 1952, and, in our opinion, this concession was rightly made. It is true that the landlords did not acquire this interest until 1954 but that seems to us to be irrelevant. In our judgment the word "created" in section 30 (2) is referable to the creation of a landlord's interest and not to the creation of the landlord's title to it. The contrary view would appear to render the word "purchased," which appears as the alternative to "created," wholly redundant.

The arguments before us were, accordingly, addressed to the question whether the landlords were disqualified from opposing the tenants' application on the ground that their interest was purchased after the beginning of the period of five years which ended with the termination of the tenants' current tenancy, and that is the issue with which we have to deal.

The first question which arises upon this issue is whether the acquisition by the landlords from Sears Ltd. in 1954 of the leasehold interest in the premises dependent on the expiration of the tenants' tenancy constituted a "purchase"; for, if it did not,

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the disqualifying provisions of section 30 (2) do not apply. If this question were res integra there would, we think, be much to be said—particularly having regard to the dictionary definition of the word " purchase " to an example of which we later refer—for the view that the word " purchase " in the section under review should not be confined to a transaction of buying for money or (strictly) money's worth. For the limited construction of the word appears to involve serious anomalies. Thus, upon this limited construction, it might make all the difference to a case like the present whether the landlord, in acquiring his relevant interest, had, in addition to giving covenants to his vendor, paid also a monetary consideration however small. Moreover, in a case where the landlord's interest had been " created " rather than " purchased " it would be immaterial whether the landlord had or had not, upon the creation of his interest (for example, by the grant of a lease), paid a cash consideration or its equivalent.

But the question is not res integra; for this court in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[1] defined the word " purchased " in the Act of 1954 in a way which is, in our opinion, binding upon us. Denning L.J., in whose judgment Hodson and Morris L.JJ. concurred, expressed the conclusion that the word in section 30 (2) of the Act of 1954 " has " the same meaning as in the Rent Acts. It has its popular " meaning of buying for money and not the technical legal meaning of acquisition otherwise than by descent or escheat." What then is the popular meaning of " buying for money " ? One of the definitions of " buy " in the Shorter Oxford English Dictionary is " to get possession of by giving an equivalent, usually " in money; to obtain by paying a price." In *Inland Revenue Commissioners* v. *Gribble*[2] Buckley L.J. said: " ' Purchaser ' " may, as it seems to me, mean any one of four things. First, it " may bear what has been called the vulgar or commercial meaning; purchaser may mean a buyer for money. Secondly, it may " include also a person who becomes a purchaser for money's " worth, which would include the case of an exchange. Thirdly, " it may mean a purchaser for valuable consideration, which " need not be money or money's worth, but may be, say, a " covenant, or the consideration of marriage. Fourthly, it may " bear that which in the language of real property lawyers is its " technical meaning, namely, a person who does not take by " descent."

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[1] [1957] 1 Q.B. 159, 170; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[2] [1913] 3 K.B. 212, 218.

Buckley L.J.'s judgment was a dissenting judgment but the passage which we have quoted was in no way at variance with the judgments of the other members of the court. It is clear, we think, from what was said in *Bolton's* case,[3] that "purchased" in section 30 (2) of the Act of 1954 falls within the first of Buckley L.J.'s four categories, to the exclusion of the other three, and means "bought for money." "Money" in this context is not confined to cash in its strict sense, for a man who bought something and paid for it by cheque would popularly be said to have bought it for money. It would, however, exclude a covenant, for the acquisition of property in consideration of giving a covenant falls within Buckley L.J.'s third category. The relevance of this is that, in the transfer to the landlords of the property in question (together with other properties), the only consideration moving from the landlords to Sears Ltd. were the covenants implied under section 77 (1) (*c*) of the Law of Property Act, 1925, and which were incorporated in the transfer. If, therefore, the only relevant document for present purposes was this instrument of transfer it would not be possible, in our judgment, having regard to *Bolton's* case[3] and *Gribble's* case,[4] to say that the landlords "purchased" the reversion in the premises. Both Mr. Blundell, however, for the landlords, and Mr. Arnold, for the tenants, were agreed that in order to ascertain the true nature of the transaction between Sears Ltd. and the landlords under which the latter acquired their interest in the premises, it is permissible to look to the contract which preceded the transfer for the purpose of seeing whether the interest was "purchased" by the landlords. This agreement was dated June 30, 1954, and is a document of somewhat special character. The third recital in the agreement is that "Sears have agreed to sell and Freeman [the "landlords] have agreed to purchase the goodwill and certain "assets used by Sears in connection with (Sears') business and "certain freehold and leasehold premises and interests in certain "other premises short particulars of which are set out in the "First and Second Schedules hereto (such properties hereinafter "sometimes collectively called 'the said properties') on the "terms and conditions hereinafter set forth." In conformity with this recital, clause 1 of the agreement is expressed in terms of sale and purchase: "Sears sell and Freeman purchase as at "January 1, 1954 (hereinafter called 'the sale date')." The clause then describes the items of property which are to be transferred and these include, as the third item, the leasehold interests in the properties particularised in the Second Schedule, amongst which are the interests now in question. Clause 2 provides that "the consideration for the sale and purchase hereby agreed shall "be in respect of the properties First to Eighthly in clause 1 "hereof the amounts respectively attributable to such properties "in such order as follows." There then follow sums of money ascertained or ascertainable in respect of items 1 and 2 and items 4 to 8. Two of these sums are purely nominal amounts of £1 each. To the leasehold interests comprised in the Second Schedule, however, no "amount" is attributed at all. The consideration for those interests is expressed to be the covenant by the landlords to pay the rents reserved and to observe and perform the covenants and conditions contained in the leases under which the properties were held and to indemnify Sears Ltd. in respect of any breach thereof. Apart from this covenant and indemnity no cash consideration, even a nominal one, was attributed to the leasehold interests comprised in the Second Schedule. Accordingly, just as the subsequent transfer of these interests could not, as already stated, be regarded as a "purchase" of the interests if the instrument were taken by itself, so also the agreement to transfer them could scarcely be regarded as an agreement by the landlords to "purchase" them, if it were to be divorced from the other terms of the contract. Perhaps, indeed, the most attractive way of putting the landlords' case on this point, as Mr. Blundell in fact put it, was as follows: Look first, as one naturally would look, to the instrument of transfer of these legal interests and one finds that it was not a transfer for money. Look then to the agreement for the transfer of the interests to see whether the consideration was intended to be money. One finds that the agreement is in precise accordance with the transfer in point of consideration. There is, therefore, no ground for suggesting that the consideration stated in the transfer was at variance with the intention of the parties. The landlords, said Mr. Blundell, were buying the business and paying for it, but were merely taking over the relevant leasehold interests.

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[3] [1957] 1 Q.B. 159.

[4] [1913] 3 K.B. 212.

We fully appreciate the force of Mr. Blundell's submission on this question but we are of opinion that it ought not to prevail. The third recital of the agreement and clause 1 and the opening words of clause 2 seem to show quite clearly that the transaction embodied in the agreement was intended by the contracting parties to be one of sale and purchase and nothing else. It is quite true that it would be difficult to say how much the landlords "paid" for the relevant interests if the amount had to be assessed in terms of money. But to an inquiry whether the landlords bought Sears Ltd.'s leaseholds, along with its business and other assets, the answer, we think, must surely be "Yes." This would, in our judgment, be the ordinary commercial view of the transaction and it could only be negatived by splitting up what is one single and indivisible agreement into different parts and treating each part as having an existence independent of the others. This would appear to us to be an illegitimate approach to the matter. If at the instance of either contracting party the court had been asked to decree specific performance of the agreement, and had done so, the subject of the decree would have been the contract as an entirety; and the contract as a whole is, in our judgment, a contract of sale. That the ordinary or "business" view of the transaction is that which we have indicated is we think supported by the terms of clause 9 (b) of the contract, which, as regards the property in the second Schedule, expressly stated that the landlords "shall be "deemed to *purchase* with full notice of the terms contained in "the leases under which such properties are held"; and by clause 10 of the contract, which reads: "Sears are *selling* and "will convey grant transfer and assign as beneficial owners."

We cannot refrain from adding upon this part of the case that the (by no means easy) question involved may, if this case should go to the House of Lords, have then become wholly academic if Mr. Blundell's argument be accepted upon the last question with which we later deal.

If, therefore, as we think, the landlords did purchase their interest in the Camden Town leaseholds, the next question which arises is, when they did so. As to this, there would seem to be three possible dates, videlicet: June 30, 1954, when the agreement between Sears Ltd. and the landlords was signed; or November 1, 1954, when the instrument of transfer was executed; or November 13, 1954, when the transfer was registered under the Land Registration Act, 1925. The "interest of the landlord" with which section 30 (2) of the Act of 1954 is concerned is presumably the interest by virtue of which the landlord opposes a tenant's application for a new lease. That interest in the present case was a legal interest in reversion expectant on the termination of the tenancy, and in our opinion the landlords "purchased" this interest on the date when the agreement with Sears Ltd. was signed, namely, June 30, 1954. They did not acquire the position or status of landlords until November 1 (or perhaps more strictly November 13), 1954, when the purchase was completed and registered; but it seems to us that the relevant date for the purposes of section 30 (2) is when a landlord purchased his interest and not when he filled the character of landlord. If so, the only question in the present case is as to the date on which the landlords, as between them and Sears Ltd., became the purchasers of the interest. As to this it is well settled (see, for example, *Lysaght* v. *Edwards*[5]) that in equity a purchaser is treated for all practical purposes as the owner of the property sold upon the signing of the contract of sale and the vendor becomes a trustee for him of the legal estate. There is nothing in the agreement of June 30, 1954, to displace this conception; and indeed it is expressly provided by clause 12 (a) thereof that until Sears Ltd. should obtain licence to assign the relevant interest (amongst others) they would "hold "and retain the legal possession thereof upon trust for Freeman "[the landlords]." We are accordingly of opinion that the landlords "purchased" the relevant interest on June 30, 1954. We would add that this view is consistent with the conclusion at which this court arrived upon a similar point under the Rent Acts in *Emberson* v. *Robinson.*[6]

The third and final question which was argued before us was as to the date of the termination of the current tenancy for the purposes of section 30 (2). The tenants' contractual tenancy expired by effluxion of time on March 22, 1959, and inasmuch as that was also the date specified in the notice which the landlords served on the tenants on March 28, 1958, terminating the tenancy, one would suppose, prima facie, that that was the date on which the current tenancy terminated. Having regard, however, to the provisions of section 64 of the Act the position is by no means as simple as that. The landlords served their notice under section 25 (1) of the Act and that subsection provides, in effect, that the notice is subject to the provisions of section 64 as to the interim continuance of tenancies pending the disposal of applications to the court. Under those provisions, where a landlord has served a notice terminating a tenancy and the tenant makes an application to the court for a new tenancy (and both these elements exist in the present case), and "apart "from this section the effect of the notice . . . would be to "terminate the tenancy before the expiration of the period of "three months beginning with the date on which the application

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[5] (1876) 2 Ch.D. 499.

[6] [1953] 1 W.L.R. 1129; [1953] 2 All E.R. 755.

" is finally disposed of, the effect of the notice . . . shall be to "terminate the tenancy at the expiration of the said period of "three months and not at any other time"; then section 64 (2) goes on to explain what is meant by "the date on which an "application is finally disposed of" and it does so in language which suggests that an application may not be finally disposed of until it has at the end of all been adjudicated upon by the House of Lords. In view of these provisions and especially of the words "and not at any other time" Mr. Blundell submits that the tenants' current tenancy cannot have terminated on the date specified in the landlords' notice under section 25 (1), namely, March 22, 1959. If the impact of section 64 on section 30 (2) is that for which Mr. Blundell contends, the result would be truly remarkable, as the following illustration will show. A. (a landlord) serves on B. (the tenant) a notice terminating the tenancy on a specified date, and stating that he would oppose an application by the tenant for a new tenancy on the ground mentioned in section 30 (1) (*g*). B. thereupon applies to the court under section 24 (1) for the grant of a new tenancy. On the matter coming before the court it is shown that A. only purchased his interest four years previously and is therefore disqualified from opposing the tenant's application because of section 30 (2). An order for a new lease is made, against which A. appeals. The appeal is heard six months later, that is to say four years and six months after A. purchased his interest. By reason of this (and in spite of the period of three months added by section 64 (1)) A. is still precluded by section 30 (2) from opposing and his appeal is therefore dismissed. A. appeals to the House of Lords and his appeal comes on for hearing one year later. By that time five years and six months will have elapsed since A. purchased his interest, and accordingly section 30 (2) no longer presents an obstacle to his opposition. If such a result as this emerges from the relevant sections of the Act of 1954 the court has no option but to give effect to it; but it is hardly one that commends itself to common sense. Mr. Blundell sought to mitigate this absurdity to some extent. He said that, for the purpose of fixing the date of termination of a current tenancy, the court should only deal with the known position and with certainties as distinct from possibilities. That principle, if sound, as applied to the present case would result in the termination of the Camden Town leases three months after the judgment of this court has been delivered on this appeal and without regard to the possibility of a further appeal

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being taken to the House of Lords. We cannot accept this suggestion, which seems to us to distort the language of section 64 (2) beyond recognition. If section 64 has, as it were, to be incorporated for all purposes in section 30 (2), it is clear that the possibility of all appeals and further appeals has to be taken into account. The question is, however, whether, in fact, the provisions of section 64 do so apply to section 30 (2). A point which is of some cogency at first sight in favour of the view that they do emerge from section 37 of the Act. That section provides for the payment of compensation to a tenant in cases where the court is precluded from making an order for the grant of a new tenancy by reason of certain of the grounds specified in section 30 (1). The amount of such compensation depends on whether or not the premises have been occupied for business purposes " during the whole of the 14 years immediately pre-" ceding the termination of the current tenancy " (section 37 (3)) and by subsection (7) it is provided that " in this section the " reference to the termination of the current tenancy is a refer-" ence to the date of termination specified in the landlord's " notice under section 25 of this Act or, as the case may be, " the date specified in the tenant's request for a new tenancy " as the date from which the new tenancy is to begin." Mr. Blundell naturally fastened on this as showing that where the legislature in a particular case wished to displace the general application of section 64 they expressly did so; and that as they did not do so for the purposes of section 30 (2) then section 64 applies. There is some force in this argument, but it appears to us that there is a sufficient answer to it. The tenant is to be entitled to the compensation " on quitting the holding." That event might occur either as a result of the landlord terminating the tenancy or as the result of the tenant asking under section 26 for a new tenancy (which ex hypothesi the court is precluded from ordering) to start from a date which he specifies in his request. The expression, therefore, in section 37 (7) " the date " of termination specified in the landlord's notice " is, we think, no more than a convenient and natural introduction to the alternative " or, as the case may be, the date specified in the tenant's " request for a new tenancy "; it is indeed difficult to see how else the first limb of the alternative could have been expressed. In our opinion, accordingly, section 37 has not the importance in this respect which Mr. Blundell sought to attribute to it.

Then Mr. Blundell says that whenever the words " the current " tenancy " appear in section 30 of the Act they are to have the

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meaning assigned to them by section 46, which is referential to section 26 (1). In that subsection the phrase is defined as meaning the tenancy under which the tenant holds for the time being. That tenancy, however, cannot be brought to an end by the landlord, except subject to the proviso in section 25 (1), which incorporates, in effect, the provisions of section 64. It follows, therefore, upon this argument that in each instance in which reference is made in section 30 to the "termination of the "current tenancy" those provisions are to be regarded as also operating. Consequently, so Mr. Blundell contends, in each of the grounds of opposition stated in section 30 (1) (*e*), (*f*) and (*g*) the "termination of the current tenancy" means when the tenancy in fact comes to an end, that is, after the termination of the current tenancy as extended by section 64: in other words, the expression is referable to some future point of time, after all litigation has been exhausted, when the landlord in fact succeeds in recovering possession of the property. We are unable, however, to accede to this submission.

In our judgment there are sufficient indications to be found in sections 30 and 31 of the Act, and in certain other provisions as well, that the phrase in section 30 (2) "the termination of "the current tenancy" is referable to the date specified in the landlord's notice served under section 25 and to that alone. It appears to us that the opening words of section 30 (2), "The "landlord shall not be entitled to oppose an application," are directed to a particular point of time, namely, the time when the tenant makes his application for a new lease. If at that time, the landlord can establish any of the grounds specified in section 30 (1), then, subject to section 30 (2), the court is precluded from ordering the grant of a new tenancy (section 31 (1)). One of the grounds of opposition specified in section 30 (1) is (*f*), "that on the termination of the current tenancy" the landlord intends to demolish or reconstruct the demised premises as therein mentioned; and it is well settled that he must establish that he entertains that intention at the time when the tenant's application is heard. It is by no means easy to see how he could establish such intention, or take any immediate and effective steps to implement it, if by reason of an appeal to this court, and a possible further appeal to the House of Lords, the current tenancy will or may not terminate until some two years later. Accordingly, it seems to us that the words "the termination of "the current tenancy" in sub-paragraph (*f*) are referring to a definite and certain point of time and not a point of time which is indefinite and uncertain; and that that point of time can only be the date specified in the notice, which the landlord has served on the tenant, or (at the latest) the date of the original hearing of the tenant's application. Very similar considerations apply to sub-paragraph (*g*) and we can only conclude from them that in neither of those sub-paragraphs were the provisions of section 64 of the Act intended to be incorporated so as to postpone the termination of the tenancy. It seems to us that the terms no less than the general sense of paragraphs (*f*) and (*g*) (and equally of paragraph (*e*)) of section 30 (1) postulate that the landlord, when he formulates the grounds (as he must) on which he will oppose the tenant's application for a new tenancy, must intelligibly express his intention as referable to a certain or ascertainable point of time. If we are right in that view, it would be inconsistent with elementary principles of construction to attribute a different meaning to the words where they appear in subsection (2) of the same section; from which it follows that the words in that subsection also fall to be construed without reference to section 64.

The matter does not, however, rest there. Section 31 (2) provides (inter alia) that if a landlord opposes on the ground specified in section 30 (1) (*f*) but does not establish it to the satisfaction of the court " then if the court would have been " satisfied of [that ground] if the date of termination specified " in the landlord's notice . . . had been such later date as the " court may determine, being a date not more than one year " later than the date so specified,—(*a*) the court shall make a " declaration to that effect, stating of which of the said grounds " the court would have been satisfied as aforesaid and specifying " the date determined by the court as aforesaid, but shall not " make an order for the grant of a new tenancy; (*b*) if within " 14 days after the making of the declaration, the tenant so " requires the court shall make an order substituting the said " date for the date specified in the said landlord's notice . . . " and thereupon that notice . . . shall have effect accordingly." It seems plain that in this subsection the draughtsman was focusing his attention on the date specified in the landlord's notice, " the date of determination " under section 25, as being for the purposes of section 30 (1) (*f*), the termination of the current tenancy. This must be so; for if the current tenancy would not, by reason of section 64, terminate until after the tenant's application for a new tenancy had been finally determined (possibly by the House of Lords), the court could not substitute a date not more than one year later than the date specified in the landlord's notice which would be the subject of a declaration and, if the tenant so required, the termination of the current tenancy. The intention was that, in the circumstances contemplated by section 31 (2), the current tenancy should determine in accordance with the landlord's notice, subject to the substitution of a deferred date for that specified in the notice. This, as we think, affords further ground for the view that the expression "the termination of the current tenancy" in section 30 is to be read without regard to the provisions as to the interim continuation of tenancies pending determination by the court which are to be found in section 64. Those provisions would, of course, operate whenever a question arose, for example, as to a landlord's right to recover possession of the demised premises after he had served a notice under section 25; but they have no relevance, in our opinion, to the ending of the five-year period with which section 30 (2) is concerned. Reference may also be made to Part I of the Act, which contains in section 12 (1) (*a*) and section 13 (3) provisions which correspond respectively to section 30 (1) (*f*) and section 31 (2) in Part II. It is clear, we think, that the reference in section 12 (1) (*a*) to the "termination of the tenancy" cannot have been intended to incorporate section 64; for a landlord, who wishes to obtain possession of premises on the ground that he proposes to demolish or reconstruct, must, under section 13 (2) (*b*), satisfy the court that he has made preparations to that end, and this would be reasonable and intelligible if the landlord had a definite date in mind when he could undertake the work but which would be quite impracticable if the provisions as to appeals in section 64 applied.

A further relevant section in Part I of the Act is section 4. Subsection (1) of that section is for relevant purposes similar to section 25 (1), including the proviso regarding the interim continuation of tenancies. Subsection (3) of the section provides that a notice under subsection (1) shall not be effective, unless it fulfils one of two alternative requirements, the first being that it contains proposals for a statutory tenancy (to take effect on termination of the tenancy) and the second being that, if the tenant is not willing to give up possession of the property "at the date of "termination of the tenancy," the landlord intends to apply for an order for possession on one or more of the grounds there referred to. If Mr. Blundell's argument is well founded, the date of the "termination of the tenancy" would appear to differ according to the alternative selected by the landlord. Moreover,

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by virtue of subsections (2) and (3) of section 7 the proposal for a statutory tenancy must include (inter alia) a proposal as to what rent is to be the standard rent of the premises. It is difficult to believe that Parliament was intending to impose on a landlord the obligation to specify the rent payable under a new tenancy, which would not commence until a wholly uncertain date possibly two years later.

It is unnecessary to specify in any detail the scope of section 64 in relation to the other provisions of the Act of 1954, and we will not attempt to do so. It is enough for present purposes to say that, in our judgment, and for the reasons which we have indicated, it is not to be regarded as being incorporated in section 30 (2) for the purpose of ascertaining the termination of a current tenancy. In other words, it seems to us that the terms of the proviso to section 25 (1) do not have, for present purposes, the effect of postponing the termination of the tenancy (when a landlord has given a valid notice under the Act) to the wholly uncertain and unascertainable date involved by reference to section 64; but only have the effect of saying that the termination of the tenancy, which remains determined by the landlord's notice, is to be without prejudice to its interim continuance, for relevant purposes, which do not include the ascertainment of the period specified in section 30 (2) as provided by section 64. It has frequently been pointed out, and was made plain by Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners*,[7] that if two constructions of statutory language are reasonably possible that will be adopted by the court which would avoid an absurdity resulting from the other. That absurdities would arise from the construction of section 30 (2) for which Mr. Blundell has contended cannot be open to question. The construction which Mr. Arnold, for the tenants, has submitted avoids these absurdities, and as, in our opinion, it is a reasonably possible construction it should be preferred.

In *In re 88, High Road, Kilburn*,[8] tenants of business premises applied under section 24 of the Act for the grant of a new lease. The landlords did not object to a new lease being granted but there was a dispute between the parties as to (among other things) the date on which it should commence. Wynn-Parry J. held (in the terms of the headnote): "that the grant of a new "tenancy which would begin at the end of the current tenancy "by virtue of section 33 of the Act of 1954 was governed by

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[7] [1953] A.C. 267, 281; [1953] 1 All E.R. 418.

[8] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

"section 64 (1) of the Act and, accordingly, the new lease would "not commence until the expiration of a period of three months "after the termination of all proceedings relating to the application, notwithstanding any injustice which might result to the "landlords by the continuation of the rent payable under the old "lease." The judge in the course of his judgment considered section 33 in conjunction with section 25 and with the proviso thereto and said [9]: "The effect of the proviso to section 25 appears "to me to be the same as if section 64 (1) had been written in at "the end of the first paragraph of section 25 (1) instead of the "proviso. I am quite unable, in view of the force of the "language used, to come to any conclusion other than that, once "the conditions stated in paragraphs (*a*), (*b*) and (*c*) of section 64 "(1) are fulfilled, the notice given by the landlord under section "25 (1) ceases to be of any effect so far as terminating the "tenancy at the date specified in his notice is concerned, and "that the tenancy will be continued and will only be terminated "under section 64 (1)." The decision, accordingly, was that in the joint context of section 33 and section 25 (1) the words "end of the current tenancy" were controlled by section 64 (1).

We do not suggest that the decision of the judge was wrong. But the Act of 1954 is not a model either of lucidity or consistency, and the fact that the expression "on the coming to an end "of the current tenancy" in section 33 has the meaning which Wynn-Parry J. attributed to it does not necessarily show that the words "the termination of the current tenancy" are to have a similar meaning in the context in which they appear in section 30 (2). As we have already pointed out, there are indications in sections 30 and 31 and elsewhere in the Act that the words were not intended to have that meaning in section 30 (2), and those reasons are not applicable to section 33. We do not, therefore, regard the decision in *In re 88, High Road, Kilburn* [9] as being inconsistent with the view which we have expressed as to section 30 (2).

For the above reasons, the appeal must, in our judgment, be dismissed.

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *Titmuss, Sainer & Webb; Isadore Goldman & Son.*

B. A. B.

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[9] [1959] 1 W.L.R. 279, 282.

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2. —— *Property — Matrimonial home — Desertion by husband—Occupation of home by wife—Sale of home by husband to mistress—Mortgage by mistress to trustees with knowledge of circumstances — Mortgage interest unpaid — Claim for possession — Rights of innocent beneficiaries of mortgagees—Exercise of court's discretion to grant possession—— Circumstances under which exercisable — Applicable terms of exercise.*

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3. —— —— *Proceedings under Married Women's Property Act*, 1882, *s.* 17—*Title deeds—Whether property within meaning of section—Claim by husband against wife for possession of title deeds—Husband trustee with no beneficial interest—Whether maintainable under the section—Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

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4. —— —— *Settlement—Variation—Determinable life interest for husband — Discretionary trust in favour of issue of marriage after determination of husband's life interest—Order of Divorce Division extinguishing all interests of husband under marriage settlement as if he "had died in the lifetime of the petitioner"—Whether discretionary trust extinguished by order.*

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2. —— Double taxation relief. See Revenue 7.

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3. —— Foreign income. See Revenue 9.

4. —— "Free of tax" payments. See Revenue 10.

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2. —— —— *Limitation — Application for new tenancy—Summons naming wrong respondents—Application to amend—Amended summons served out of time—Effect on vested rights—Whether amendment proper—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 29 (3)—*R.S.C., Ord.* 53D, *r.* 3 (2).

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In re Nos. 55 & 57, Holmes Road, Kentish Town. Beardmore Motors Ltd. *v.* Birch Bros. (Properties) Ltd. - **Harman J. 298**

3. —— —— *Terms of new tenancy — Collateral term—Right to display advertising signs under existing tenancy—Whether term of tenancy—Whether right to be included in new lease—Jurisdiction of court—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 35.

In re No. 1, Albemarle St. - **Upjohn J. 531**

4. —— *Repairs — Act of* 1938 — *Leave to proceed for possession—Breaches of covenants to repair—Application by lessor for leave to proceed in claims for forfeiture and damages—Matters to be proved to obtain such leave—Law of Property Act*, 1925, (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (1) (3)—*Leasehold Property* (*Repairs*) *Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 (1) (5) (*as amended by the Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 51).

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5. —— —— *Covenant — "Structural "repairs of a subsequent nature"—Meaning of "structural repairs"—Meaning of "sub-"stantial"—Notice to landlords of disrepair —Disrepair due to failure of tenants' predecessors to repair—Liability of landlords—Long delay by landlords in complying with notice—Refusal of landlords to give specification of proposed repairs — Landlords' workmen prevented from doing repairs—Repairs done by tenants—Whether tenants entitled to damages.*
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PERPETUITY RULE—Application of. See Trust and Trustee 3.

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PRACTICE — *Originating summons — Construction question—Jurisdiction—Person "interested under . . . written instrument"—"Claiming any legal or equitable right"—Town and country planning — Enforcement notice — Validity — Originating summons for declaration that notice invalid—Whether correct procedure—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23—*R.S.C., Ord.* 54a, *rr.* 1, 1a.
Town and Country Planning—Enforcement notice — Form — Validity — Originating summons for declaration that notice invalid — Whether correct procedure—Town and Country Planning Act, 1947, *s.* 23—*R.S.C., Ord.* 54a, *rr.* 1, 1a.
Rigden *v.* Whitstable Urban District Council - - - - **Danckwerts J. 422**

2. —— *Payment into court—Payment out — Enforcement of judgment — Judgment recovered by creditor in county court—Fund lodged in High Court to credit of judgment debtor—Application to High Court for charging order on fund in respect of judgment in county court — Jurisdiction — Judgments Act*, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 12 — *County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 136 (1) (2)—*Administration of Justice Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 34 (3).
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RESTRAINT OF TRADE — *Employment—Agreement—Agreement between two companies that neither company would engage servants of the other—No provision giving power to determine contract—Duration—Reasonableness —Public policy—Validity.*
Contract—Termination.
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2. —— —— *Interest in expectancy — Deferred payment of duty—Purchase by life tenant of interest in expectancy—Falling into possession — Whether estate duty payable on the purchase price or at the death of life tenant or not at all—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (6).

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3. —— —— *Property chargeable — Immovable property situate outside Great Britain — Settlement — Testamentary disposition — Whether property excluded for estate duty purposes from property passing on death of tenant for life—Proper law of disposition—Finance Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

Conflict of Laws — Immovable property — Assignment — Will — Settlement — Trust for sale—Proper law.

Revenue — Estate duty — Practice — Determination of liability as to estate duty—Desirability of agreed statement of points of law — Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 3.

Philipson-Stow *v.* Inland Revenue Commissioners - - - - **Upjohn J. 395**

4. —— —— *Property passing on death—Property chargeable—Derivative trust—Gift of income of trust fund to beneficiaries of " A " trust for* 21 *years subject to discretionary power of accumulation—Gift over to persons to be appointed under " B " trust—Rights of " A " beneficiaries relinquished by deed and court order in favour of " B " beneficiaries subject to similar power — Appointment of " B " beneficiary to interest in income of trust fund—Death of beneficiary before expiration of* 21 *years—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*).

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5. —— —— *Valuation — Shares — Control of company — Shares held by deceased beneficially — Further shares held as trustee —Whether register of members conclusive—Whether deceased in control of company—Method of valuation—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5)*—Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55 (*as amended by Finance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company—Control—Estate duty purposes—Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55.

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6. —— —— *Valuation — Shares — Control of company — Shares held by deceased beneficially — Shares held as trustee jointly with co-trustees—Shares settled by deceased—Deceased first on share register — Whether register of members conclusive — Whether deceased in control of company — Method of valuation—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5) *— Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 55, 58 (*as amended by Finance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company—Control—Estate duty purposes—Trustee shareholder—Register of members—Whether conclusive—Finance Act, 1940, *s.* 55.

Meaning of " deemed."

Barclays Bank Ltd. *v.* Inland Revenue Commissioners - - - - **C.A. 659**

7. —— *Income tax—Double taxation relief —Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom—Assessments to income tax on life fund interest — Competence of assessments— " Industrial or commercial profits "—Whether taxable surpluses properly so described—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. I*, *Sch. D*, *rules applicable to Case III*, *r.* 3*—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 430*—Double Taxation Relief (Taxes on Income) (Australia) Order*, 1947 (*S.R. & O.*, 1947, *No.* 806), *Sch.*, *art. II* (1) (i) (3); *art. III* (2) (3).

Ostime (Inspector of Taxes) *v.* Australian Mutual Provident Society - - **C.A. 427**

8. —— —— *Employment — Collateral agreement — Scheme by employer to provide housing assistance to employees — Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156 (2), *Sch.* 9, *Rules applicable to Sch. E*, *r.* 1.

Revenue—Income tax—Expenses—Benefit to employee—Whether reimbursement on loss on sale of house an " expense "—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 160.

Decision of Upjohn J. affirmed. Jennings *v.* Kinder (Inspector of Taxes). Hochstrasser (Inspector of Taxes) *v.* Mayes **C.A. 22**

9. —— —— *Foreign income—Remittance to United Kingdom — Cheques drawn in dollars on foreign bank—Purchase by English bankers —Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England — Whether income from foreign securities or possessions—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D*, 1 (*a*) (i), *Cases IV*, *r.* 2, *and V*, *r.* 2.

Thomson (Inspector of Taxes) *v.* Moyse **C.A. 464**

10. —— —— *" Free of tax " payments—Provision made before September* 3, 1939*—Covenant to pay annuity after death of husband in marriage settlement made before*

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